DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-9647
Title: Kuntrell Jackson, Petitioner
v.
Ray Hobbs, Director, Arkansas Department of Correction
Docketed: March 23, 2011
Lower Ct: Supreme Court of Arkansas
Case Nos.: (09-145)
Decision Date: February 9, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 21 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 22, 2011)
Apr 6 2011	Waiver of right of respondent Ray Hobbs, Director, Arkansas Department of Correction to respond filed.
Apr 20 2011	DISTRIBUTED for Conference of May 12, 2011.
May 2 2011	Response Requested . (Due June 1, 2011)
Jun 1 2011	Brief of respondent Ray Hobbs, Director, Arkansas Department of Correction in opposition filed.
Jun 13 2011	Reply of petitioner Kuntrell Jackson filed.
Jun 16 2011	DISTRIBUTED for Conference of September 26, 2011.
Oct 3 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 24 2011	DISTRIBUTED for Conference of October 28, 2011.
Oct 31 2011	DISTRIBUTED for Conference of November 4, 2011.
Nov 7 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED. The case is to be argued in tandem with No. 10-9646, Miller v. Alabama.
Dec 7 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including January 9, 2012.
Dec 9 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondent.
Dec 19 2011	SET FOR ARGUMENT ON Tuesday, March 20, 2012.
Jan 4 2012	Record from Supreme Court of Arkansas available electronically
Jan 5 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jan 9 2012	Joint appendix filed. (Statement of costs filed)

Jan 9 2012	Brief of petitioner Kuntrell Jackson filed.
Jan 13 2012	The time to file respondent's brief on the merits is extended to and including February 14, 2012.
Jan 13 2012	Brief amici curiae of American Medical Association, et al. filed. VIDED. (Distributed)
Jan 16 2012	Brief amici curiae of Amnesty International, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Former Juvenile Court Judges filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Probation and Parole Association, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amicus curiae of American Bar Association filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of American Psychological Association, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Certain Family Members of Victims Killed by Youths filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Jeffrey Fagan, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Professor of Law and His Students from Moritz College of Law at Ohio State University filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of J. Lawrence Aber, et al. filed. VIDED. (Distributed)
Jan 17 2012	Brief amici curiae of Juvenile Law Center, et al. filed. VIDED. (Distributed)
Jan 31 2012	CIRCULATED.
Feb 14 2012	Brief of respondent Ray Hobbs, Director, Arkansas Department of Correction filed. (Distributed)
Feb 21 2012	Brief amicus curiae of National District Attorneys Association filed. VIDED. (Distributed)
Feb 21 2012	Brief amicus curiae of National Organization of Victims of Juvenile Lifers filed. VIDED. (Distributed)
Feb 21 2012	Brief amici curiae of Michigan, et al. filed. VIDED. (Distributed)
Feb 24 2012	Motion of Michigan, et al. for leave to participate in oral argument as amici curiae and for divided argument filed. VIDED.
Mar 5 2012	Motion of Michigan, et al. for leave to participate in oral argument as amici curiae and for divided argument DENIED. VIDED.
Mar 12 2012	Reply of petitioner Kuntrell Jackson filed. (Distributed)
Mar 20 2012	Argued. For petitioner: Bryan A. Stevenson, Montgomery, Ala. For respondent: Kent G. Holt, Assistant Attorney General, Little Rock, Ark.
Jun 25 2012	Judgment REVERSED and case REMANDED. Kagan, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Breyer, J., filed a concurring opinion, in which Sotomayor, J., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia, Thomas, and Alito, JJ., joined. Thomas, J., filed a dissenting opinion, in which Scalia, j., joined. Alito, J., filed a dissenting opinion, in which Scalia, J., joined.

PETITION FOR WRIT OF CERTIORARI

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

KUNTRELL JACKSON, Petitioner,

v.

STATE OF ARKANSAS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kuntrell Jackson has been sentenced to life imprisonment without the possibility of parole for an offense committed when he was fourteen years old. He is one of only 73 fourteen-year-olds serving such a sentence throughout the United States. His case presents an ideal vehicle for this Court's consideration of the question left undecided by Graham v. Florida and Sullivan v. Florida – whether the Eighth Amendment forbids a life-without-parole sentence for a young juvenile convicted of a homicide offense – because, while Kuntrell's offense did involve a homicide, he was convicted only on the theory that he was an accomplice to a robbery in which an older boy shot a shop attendant. Kuntrell himself did not commit the killing and was not shown to have had any intent or awareness that the attendant would be shot. The robbery "plan," such as it was, was spur-of-the-moment, formed just before the robbery, while Kuntrell, his cousin, and another older teen were walking together through a housing project. Because Arkansas law made a life-without-parole sentence mandatory upon Kuntrell's homicide conviction, neither his age nor any of these other mitigating circumstances could be considered by his sentencer. Under these circumstances, the questions presented are:

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... v

PETITION FOR CERTIORARI..... 1

OPINIONS BELOW..... 1

JURISDICTION..... 1

RELEVANT CONSTITUTIONAL PROVISIONS..... 1

STATEMENT OF THE CASE..... 1

A. The Rarity of Life Without Parole Sentences for Young Adolescents.. 3

B. Kuntrell's Background, Offense, and Conviction..... 4

C. Procedural History of the Judgment in Issue..... 6

D. The State Supreme Court Ruling..... 7

REASONS FOR GRANTING THE WRIT..... 8

I. REVIEW SHOULD BE GRANTED TO DECIDE THE QUESTION UNRESOLVED BY GRAHAM v. FLORIDA AND SULLIVAN v. FLORIDA, WHETHER A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED UPON A FOURTEEN-YEAR-OLD CHILD FOR THE CRIME OF MURDER CONSTITUTES CATEGORICALLY CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS..... 8

A. The Court's Reasoning in Graham Requires the Conclusion that Sentencing Children of Fourteen and Under to Life Imprisonment With No Possibility of Parole Violates the Eighth and Fourteenth Amendments..... 10

1. Scientific Research Firmly Supports the Legal

Recognition that Fourteen-Year-Old Children Are Developmentally Different from Older Teens in Constitutionally Relevant Ways.. 11

2. The Law Recognizes the Critical Differences Between Fourteen-Year Old Children and Older Adolescents. 17

3. The Singular Characteristics of Young Adolescents that Distinguish Them from Older Teens and Adults Are No Less Applicable to Homicide Offenses than to Other Crimes 19

B. The Extreme Rarity With Which Fourteen-Year-Olds Are Sentenced to Life in Prison without Parole Dramatically Supports Kuntrell's Eighth Amendment Claim.. 22

II. REVIEW SHOULD ALSO BE GRANTED TO DETERMINE WHETHER, CONSISTENTLY WITH GRAHAM v. FLORIDA, A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE CAN BE IMPOSED UPON A MURDER CONVICTION WHICH IS BASED SOLELY ON ACCESSORIAL-LIABILITY AND FELONY-MURDER PRINCIPLES, WITH NO SHOWING THAT THE JUVENILE OFFENDER KILLED OR INTENDED TO KILL ANYONE.. 26

A. A Life-Without-Parole Sentence for a Juvenile Who Was Not Convicted of Intentional Murder Appears Starkly at Odds with Graham.. 27

B. A National Consensus Has Emerged Against Sentencing Juveniles to Life Without the Possibility of Parole for Unintentional Homicides. 28

C. A Sentence of Life Without Parole for a Juvenile Who Did Not Intend to Kill Cannot be Justified under Any Valid Penological Goal. 29

III. THE COURT SHOULD ALSO GRANT THIS PETITION TO CONSIDER WHETHER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE FORBIDS THE IMPOSITION OF A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE ON A FOURTEEN-YEAR-OLD CHILD – A PROCEDURE WHICH PRECLUDES THE SENTENCER FROM TAKING THE CHILD'S AGE OR ANY OTHER MITIGATING CIRCUMSTANCES INTO CONSIDERATION..... 31

CONCLUSION..... 35

APPENDIX A Arkansas Supreme Court Order affirming judgment of the Circuit Court of the Eleventh Judicial Circuit-West Second Division, Jefferson County (Feb. 9, 2011).

APPENDIX B Circuit Court of the Eleventh Judicial Circuit-West Second Division, Jefferson County Order and judgment denying habeas relief (Sept. 17, 2008).

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Enmund v. Florida, 458 U.S. 782 (1982)..... 31

Graham v. Florida, 130 S. Ct. 2011 (2010)..... passim

Harmelin v. Michigan, 501 U.S. 957 (1996)..... 34, 35

Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb 9, 2011)
..... 7, 17, 26, 28, 32, 35

Jackson v. State, 194 S.W.3d 757 (Ark. 2004)..... 5, 6, 27, 28

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In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009)..... 3, 24, 25

Roberts v. Louisiana, 431 U.S. 633 (1977)..... 34

Roper v. Simmons, 543 U.S. 551 (2005)..... passim

Stanford v. Kentucky, 492 U.S. 361 (1989)..... 18

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Thompson v. Oklahoma, 487 U.S. 815 (1988)..... 18, 26

Tyson v. Arizona, 481 U.S. 137 (1987)..... 30

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Workman v. Commonwealth, 429 S.W.2d 374 (Ky. 1968)..... 18

STATUTES

28 U.S.C. §1257(a)..... 1

29 U.S.C. § 203. 18

29 U.S.C. § 212. 18

29 U.S.C. § 213. 18

Ark. Code § 5-10-101. ..... 5, 6, 27, 31

Ark. Stat. Ann. § 6-18-201. 17

Ark. Stat. Ann. § 9-11-102. 17

Ark. Stat. Ann. §§ 11-6-105. 17

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PETITION FOR CERTIORARI

Kuntrell Jackson respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

The opinion of the majority of the Arkansas Supreme Court, together with a concurring opinion by one Justice and a dissenting opinion by two Justices, is reported at 2011 Ark. 49 and is attached as Appendix A. The order of the Jefferson County Circuit Court is unreported and is attached as Appendix B.

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on February 9, 2011. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In Graham v. Florida, 130 S. Ct. 2011 (2010), this Court held that the Eighth

and Fourteenth Amendments prohibit sentencing an adolescent of seventeen or younger to be imprisoned for life, with no possibility of consideration for parole, as the punishment for a nonhomicide offense. The Court in Graham did not address the question whether such a sentence would be constitutionally permissible for a homicide offense. That question will eventually need to be authoritatively resolved by a decision of this Court because – as illustrated by Kuntrell Jackson's present petition and by the certiorari petition being filed today on behalf of Evan Miller in Alabama – state courts are holding that Graham has no implications for homicide sentencing, even when the juvenile offender is as young as fourteen.

In the wake of the lower courts' constrictive applications of Graham, Kuntrell Jackson's case offers an exceptionally good setting for the Court's consideration of the issue that Graham left unresolved, together with a pair of closely related issues. Yes, Kuntrell Jackson stands convicted of murder as a result of his participation in a robbery in which the victim's death occurred. But Kuntrell's personal culpability for the events leading to that tragic outcome cannot rationally be regarded as any greater than Terrance Graham's culpability. Unlike Terrance Graham, Kuntrell never held a weapon in his hand; he did not offer any physical violence to the victim of the storefront robbery in which she was shot to death by one of his older companions; the robbery itself was impetuous rather than preplanned; the prosecution did not contend – and under Arkansas' accomplice-liability and felony-murder it rules was not obliged to prove – that Kuntrell intended or expected any shooting; and Kuntrell was three years younger than Terrance Graham. And none of these circumstances could even be

considered in mitigation by Kuntrell's sentencer, because Arkansas law prescribed a mandatory life-without-parole sentence based solely on the crime-of-conviction. Yet, over two dissents (and despite a third Justice's discontent with the mandatory character of Kuntrell's sentence), the Arkansas Supreme Court used Kuntrell's case not only to curb Graham's constitutional rule but to produce a result flatly at odds with Graham on the facts of both cases. With respect, such a drastic abridgment of Graham should not be left unreviewed by this Court.

A. The Rarity of Life Without Parole Sentences for Young Adolescents

Nationwide, Kuntrell Jackson is one of only seventy-three children age fourteen or younger who have been condemned to die in prison through sentences of life without parole.[1] In the vast majority of states, no child Kuntrell's age has ever received such a sentence. Only eighteen states have imposed such sentences on children fourteen or younger.[2] In ten of these states, no more than one or two children Kuntrell's age have

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[1]Equal Justice Initiative, Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison 20 (2007), available at http://www.eji.org/eji/files/20071017cruelandunusual.pdf. Since the publication of this report, while a handful of these children have obtained relief from their convictions or sentences, including under this Court's decision in Graham v. Florida, 130 S. Ct. 2011 (2010), there have also been a few new sentences imposed. Thus, this number remains fairly constant at just over seventy children.

[2]Cruel and Unusual at 20. This report identified eighteen states, in addition to Arkansas, where thirteen- or fourteen-year-olds have been sentenced to death in prison. A total of eighteen states, not nineteen, is more relevant to this Court's analysis because California statutorily prohibited the imposition of life imprisonment without parole on a defendant under age sixteen who is convicted of first-degree murder, Cal. Pen. Code, § 190.5(b), and also no longer permits fourteen-year-olds to be sentenced to life without parole for any offense, see In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

been sentenced to life imprisonment without parole. Internationally, the United States is the only country in the world where death-in-prison sentences have been imposed on young adolescents.[3]

These seventy-three cases represent just a tiny fraction of cases in which children fourteen or younger could have received such sentences. According to the FBI's Uniform Crime Statistics, since 1990, 3,632 children age fourteen or younger were arrested for homicide.[4] Yet only fifty-eight children that age have been sentenced to life without parole for homicide offenses during the same period, representing less than two percent of those arrested.

B. Kuntrell's Background, Offense, and Conviction.

Kuntrell Jackson grew up in public housing projects in Blytheville, Arkansas, an impoverished community notable for drugs and violence, including several shootings. (App.R. 9.)[5] Kuntrell's biological father abandoned the family before Kuntrell's birth and never played a significant role in Kuntrell's life. Id. A longtime boyfriend of Kuntrell's mother, one Leander Bobo, was the closest thing Kuntrell had

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[3]See Connie De La Vega & Michelle Leighton, Sentencing Our Children to Die in Prison: Global Law & Practice, 42 U.S.F. L. Rev. 983, 990 (2008).

[4]This total is based on the Department of Justice Uniform Crime Reports for 1990 to 2009. See generally U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States, http://www.fbi.gov/ucr/ucr.htm. The underlying data for each year is found in the report for that year at Table 38.

[5]Citations to the record on appeal are designated as "(App.R.)." Citations to the clerk's record at trial are designated as "(C.)," and citations to the trial record are designated as "(R.)."

to a father figure. Bobo was an abusive alcoholic who drained the family's resources. Id. Kuntrell's mother was sent to prison for shooting and injuring a neighbor when Kuntrell was about six years old. Id. When Kuntrell was about thirteen years old, his older brother Douglas was also imprisoned for shooting someone. (App.R. 9-10.) Not long after this, Bobo left the family; two of Kuntrell's teenage sisters became pregnant; and several other relatives were incarcerated. (App.R. 10.)

After Kuntrell was indicted in the present case – on one count of capital felony murder pursuant to Arkansas Code § 5-10-101, and one count of aggravated robbery pursuant to Arkansas Code § 5-12-103 (C. 3-4), the presiding judge at a preliminary hearing described his mental capacity as "borderline or near borderline." (App.R. 28.) Kuntrell's inability to engage in abstract reasoning places his mental functioning at the 4th percentile compared to children his age. (App.R. 27.)

The felony-murder and robbery charges were based on an incident that occurred on November 18, 1999, only seventeen days past Kuntrell's fourteenth birthday. According to the state's evidence at trial, Kuntrell and two older boys named Derrick Shields and Travis Booker (Kuntrell's cousin) were walking through a housing project together when the three began discussing the idea of robbing a local video store. See Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004). Thereafter, Kuntrell became aware that Shields was carrying a shotgun in his coat sleeve. Id. When they arrived at the store, the other two boys entered, while Kuntrell decided to remain outside. Id. Inside, Shields pointed the gun at the store clerk and demanded money six or seven times. Id. at 758-59. The clerk refused each demand. Id. at 759. During this exchange, Kuntrell

entered the store. Id. When the clerk threatened to call the police, Shields shot and killed her. Id. The boys ran from the store. Id. They did not take any money. Id.

Kuntrell was convicted of capital murder and aggravated robbery on July 19, 2003, following a two-day trial. (R. 357.) The judge, legally barred from considering Kuntrell's level of involvement in the offense or his background, imposed a mandatory sentence of life without the possibility of parole for the capital murder conviction.[6] (R. 359-61.)

C. Procedural History of the Judgment in Issue

Based on this Court's decision in Roper v. Simmons, 543 U.S. 551 (2005), Kuntrell filed a petition for a writ of habeas corpus under Arkansas Code § 16-112-101 et seq., in the Jefferson County Circuit Court on January 8, 2008. Kuntrell asserted in the petition that the Eighth and Fourteenth Amendments prohibit a mandatory sentence of life-without-parole for a fourteen-year-old child who was not the trigger person and who did not intend to kill. The state filed a motion to dismiss. Following a non-evidentiary hearing, the circuit court granted the state's motion on September 17, 2008, ruling that Kuntrell's constitutional claims did not go to the jurisdiction of the convicting court and were therefore not cognizable in state habeas. See Appendix B.

Kuntrell filed a timely appeal to the Arkansas Supreme Court on March 27, 2009. While the case was pending, this Court decided Graham v. Florida, 130 S.Ct.

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[6]The trial court did not sentence Kuntrell for the aggravated robbery conviction. Jackson, 194 S.W.3d at 759.

2011 (2010), holding that juveniles cannot be sentenced to life without parole for nonhomicide offenses. On June 16, 2010, Kuntrell filed a motion requesting leave from the supreme court to brief the impact of Graham on Kuntrell's appeal. The court granted Kuntrell's motion on August 6, 2010. Kuntrell filed his brief on August 21, 2010. It advanced three arguments based on Graham. First, Graham confirmed Kuntrell's basic submission that juveniles sentenced to life imprisonment without parole could maintain categorical challenges to their sentences under the Eighth and Fourteenth Amendments. Second, Graham's recognition that a young person's age must constitutionally be considered at sentencing prohibited mandatory sentences of life without parole for juveniles. Third, because Kuntrell did not commit the shooting and did not intend the victim's death, Graham invalidated his life-without- parole sentence.

The Arkansas Supreme Court affirmed Kuntrell's sentence on February 9, 2011. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb 9, 2011). Unlike the lower state court, it entertained and rejected Kuntrell's federal constitutional claims on the merits.

D. The State Supreme Court Ruling

Squarely addressing Kuntrell's Eighth and Fourteenth Amendment claims, the Arkansas Supreme Court concluded that "the [United States Supreme] Court's holdings in Roper and Graham are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile." A four-justice majority therefore "decline[d] to extend

the Court's bans to homicide cases involving a juvenile where the death penalty is not at issue." Id. Justices dissented from the court's judgment. Id. (Danielson, J., joined by Corbin, J., dissenting). The dissent concluded that Graham rendered Kuntrell's sentence unconstitutional because the state failed to prove that he had any intent to kill. Id. (citing Graham, 130 S.Ct. at 2018). The dissenters emphasized that Kuntrell's role in the offense was equal to or less than that of Terrance Graham. Id. In addition, they observed that the mandatory sentence imposed upon Kuntrell did not take account of Kuntrell's young age or other mitigating circumstances, as is required under Graham. Id. (citing Graham, 130 S.Ct. at 2031). A third justice wrote a separate concurrence to note his agreement with Kuntrell's submission that, in the case of a juvenile convicted of felony murder, the sentencer should not be permitted to impose a sentence of life without the possibility of parole in the absence of a procedure for considering aggravating and mitigating evidence. Id. (Brown, J., concurring). The concurrence noted that such individualized consideration in Kuntrell's case "may well have convinced the jury that life without parole was too severe and not appropriate in light of Jackson's age and circumstances." Id.

REASONS FOR GRANTING THE WRIT

I. REVIEW SHOULD BE GRANTED TO DECIDE THE QUESTION UNRESOLVED BY GRAHAM v. FLORIDA AND SULLIVAN v. FLORIDA, WHETHER A LIFE-WITHOUT-PAROLE SENTENCE IMPOSED UPON A FOURTEEN-YEAR-OLD CHILD FOR THE CRIME OF MURDER CONSTITUTES CATEGORICALLY CRUEL AND UNUSUAL PUNISHMENT THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

When this Court in Graham v. Florida began consideration of the

constitutionality of sentencing youthful offenders to lifelong imprisonment with no possibility of ever being considered for release, it took instruction from the well-informed contemporary understanding of the common characteristics of young people that had informed its earlier decision in Roper v. Simmons. It cited scientific studies of adolescent brain structure and functioning which confirm the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later in life. It was these common features of youth that led the Court to conclude that juveniles under eighteen possess an inherently "lessened culpability," Graham v. Florida, 130 S.Ct. 2011, 2026 (2005) (citing Roper v. Simmons, 543 U.S. 551, 569-70 (2005)) and "are less deserving of the most severe punishments [than adults]." Id.

Logically the same teachings of science, commonsense observations of teen behavior, and moral reasoning compel two additional conclusions: One is that adolescents' degree of "lessened culpability" cannot rationally be supposed to be crime-specific – more lessened in the case of home-invasion robbery, for example, than in the case of robbery-murder. The second is that, by every measure deemed relevant in Roper and Graham, children under fifteen are a distinct and distinctly less culpable class as compared with older juveniles. Moreover, national statistics demonstrate that children fourteen or younger are particularly rarely sentenced to die in prison. These considerations manifestly call into question the decision of the Arkansas Supreme Court in Kuntrell Jackson's case that the constitutional holdings of Roper and Graham

allow the imposition of a life-without-parole sentence on a fourteen-year-old convicted of homicide.

A. The Court's Reasoning in Graham Requires the Conclusion that Sentencing Children of Fourteen and Under to Life Imprisonment With No Possibility of Parole Violates the Eighth and Fourteenth Amendments.

Following Roper, this Court in Graham recognized three defining characteristics of youth, which together establish that "juvenile offenders cannot with reliability be classified among the worst offenders." Graham, 130 S.Ct. at 2026 (quoting Roper, 543 U.S. at 569) (quotations omitted). Relative to adults, juveniles demonstrate a "lack of maturity and an underdeveloped sense of responsibility . . . are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed." Id. (quoting Roper, 543 U.S. at 569-70).

Each of these characteristics applies with greater force to the subset of children fourteen and younger. Relying on recent advances in our society's understanding of brain development, the Court noted that "parts of the brain involved in behavior control continue to mature through late adolescence." Graham, 130 S.Ct. at 2026. Thus, younger children lag behind their older teenage counterparts in maturity. This implication is thoroughly documented by systematic child development studies and widely recognized by child-protective laws, including those which aim to protect children against the consequences of their own underdeveloped judgment.

1. Scientific Research Firmly Supports the Legal Recognition that Fourteen-Year-Old Children Are Developmentally Different from Older Teens in Constitutionally Relevant Ways.

Extensive scientific research supports the legal recognition of young adolescence as a distinct developmental period. Relative to the cognition of adults and even older adolescents, young teenage judgment is handicapped in nearly every conceivable way: young adolescents lack life experience and background knowledge to inform their choices; they struggle to generate options and to imagine consequences; and, perhaps for good reason, they lack the necessary self-confidence to make reasoned judgments and stick by them.[7] Even when compared to twelfth graders (rather than adults), eighth graders show relative deficiencies in imagining risks and future consequences.[8] At fourteen, the major transformation in brain structure that will result in a

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[7] See B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265, 267–70 (1989) (Young adolescents show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than mid-adolscents); Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones).

[8] Catherine C. Lewis, How Adolescents Approach Decisions, 52 Child Dev. 538, 543 (1981); see also Bonnie L. Halpern-Felsher & Elizabeth Cauffman, Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults, 22 J. Applied Dev. Psychol. 257, 271 (2001) (noting important differences in decision-making competence of early adolescents and older teenagers).

sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[9]

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[9]See Luna, supra note 7, at 257; see also Thomas J. Whitford et al., Brain Maturation in Adolescence, 28 Human Brian Mapping 228, 228 (2007) (adolescence is "peak period of neural reorganization"). At the core of this transformation are co-occurring increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, Structural Magnetic Resonance Imaging of the Adolescent Brain, 1021 Annals N.Y. Acad. Sci. 77, 77–83 (2004). Myelination increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior – it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed facilitated by myelination facilitates cognitive complexity. Charles Geier & Beatriz Luna, The Maturation of Incentive Processing and Cognitive Control, 93 Pharmacol. Biochem. Behav. 212, 216 (2009); see also Giedd, supra, at 80 (during myelination transmission time between neurons is increased up to 100 times). White matter in the brain increases in a linear fashion, such that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. Giedd, supra, at 80.

Cortical gray matter is thickest early in adolescence. Id. at 82. Later in the teenage years, this cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. Id.; see also Tracy Rightmer, Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults, 9 Quinnipiac Health L.J. 1, 12 (2005); L.P. Spear, The Adolescent Brain and Age-Related Behavioral Manifestations, 24 Neurosci. & Biobehav. Rev. 417, 439 (2000).

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that control executive functioning and process risk do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., Brain Development During Childhood and Adolescence: a Longitudinal MRI Study, 2 Nature Neurosci. 861, 862 (1999); see also Elizabeth R. Sowell et al., In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions, 2 Nature Neurosci. 859, 860 (1999) (in longitudinal study of brain development, finding prefrontal cortex loses gray matter only at end of adolescence); Beatriz Luna & John A. Sweeney, The Emergence of Collaborative Brain Function, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). These "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature

Early teenagers' incapacity for responsible decisionmaking is closely related to adolescent risk-taking.[10] A "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[11] "The temporal gap between the arousal of the socioemotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of

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well into late adolescence." Laurence Steinberg & Elizabeth S. Scott, Less Guilty by Reason of Adolescence, 58 Am. Psychologist 1009, 1013 (2003). Indeed, the brain does not appear to finish growing completely until late adolescence. Elizabeth R. Sowell et al., Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping, 9 NeuroImage 587, 596 (1998); see also Halpern-Felsher & Cauffman, supra note 8, at 271 ("Importance progress in the development of decision-making competence occurs sometime during late adolescence. . . .").

[10]See, e.g., Laurence Steinberg, Risk-Taking in Adolescence: New Perspectives from Brain and Behavioral Science, 16 Current Dir. Psychol. Sci. 55, 56–58 (2007); Geier & Luna, supra note 9, at 218; Ann E. Kelley et al., Risk Taking and Novelty Seeking in Adolescence, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004). The literature documenting adolescents' proclivity for risk-taking is too extensive even to summarize within the compass of this brief.

[11]Laurence Steinberg, Elizabeth Cauffman, et al., Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report, 44 Dev. Psychol. 1764, 1764 (2008).

heightened vulnerability to risk taking during middle adolescence."[12] The dangers created by this gap are compounded by the fact that, while all adolescents are more peer-oriented than adults, vulnerability to peer pressure, especially for boys, appears to increase during early adolescence to an all-time high in eighth grade.[13] It may fairly be said that extreme vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[14] Fortunately, most teens grow out of this behavior as a predictable part of the maturation process.[15]

Young teens, to a greater extent than older teens, are also handicapped by their

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[12]Laurence Steinberg, Adolescent Development and Juvenile Justice, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

[13]Laurence Steinberg & Susan B. Silverberg, The Vicissitudes of Autonomy in Early Adolescence, 57 Child Dev. 841, 848 (1986); id. at 846 (autonomy in the face of peer pressure has been shown to decline during early adolescence, "especially for boys, and especially when the pressure is to do something wrong"); see also Mann supra note 7, at 267–268, 274 (early adolescence associated with greatest conformity to peer group pressure); Steinberg, Risk-Taking, supra note 10, at 57 (susceptibility to antisocial peer influence peaks in mid-adolescence); N. Dickon Reppucci, Adolescent Development and Juvenile Justice, 27 Am. J. Community Psychol. 307, 318 (1999) (social conformity peaks around age 15)

[14]Spear, supra note 9, at 421; Reppucci, supra note 13, at 319.

[15]Spear, supra note 11, at 421 (adolescent experimentation in risk-taking is transient for most individuals); Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 L. & Human Behav. 219, 229 (2002) (defying rules is part of adolescent experimentation with autonomy and identity development, and many youths who manifest "deviance" in adolescence will not do so in adulthood); Reppucci, supra note 13, at 319 ("[D]esistance from antisocial behavior is also a predictable part of the maturation process.").

undeveloped sense of self and their inability to imagine their futures.[16] It is not until the late teens or early twenties that they begin to form a coherent identity – although teens sixteen and older have a more mature sense of self than adolescents under fifteen.[17] Very few young adolescents think about their future beyond age 30.[18] As adolescents grow older, they become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family; with this added perspective, their ability to plan and to realistically anticipate long-term consequences

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[16]See Nurmi, supra note 7, at 12–13; see also Laurence Steinberg & Elizabeth Cauffman, Maturity of Judgment in Adolescence, 20 L. & Human Behav. 249, 255 (1996) (moral reasoning and reflectiveness are associated with sense of identity, which does not begin to consolidate until late teens or early twenties; extreme vulnerability in self-image seen especially in younger adolescents); Seagrave & Grisso, supra note 15, at 229 ("Many adolescents focus excessively on present circumstances and weight the importance of risks differently than do adults, especially when under emotional stress or in situations where a solution is not readily apparent."); Reppucci, supra note 13, at 318 (adolescents "discount the future more than adults" and "weigh more heavily the short-term versus the long-term consequences of decisions"); Jeffrey Arnett, Reckless Behavior in Adolescence, 12 Dev. Rev. 339, 344 (1992) (adolescents' limited life experience impairs ability to fully apprehend possible negative consequences of their actions); Laurence Steinberg, A Social Neuroscience Perspective on Adolescent Risk-Taking, 28 Dev. Rev. 78, 90 (2008) (feelings of self-consciousness increase during early adolescence, peak around age 15, then decline).

[17]Steinberg, Social Neuroscience, supra note 16, at 94 (future orientation and planning increase from 16–18); Seagrave & Grisso, supra note 15, at 226 (adolescence is time of dramatic changes in identity, during which adolescent may present an "insincere and seemingly choreographed social facade, either by attempting to manage peers' impressions or because they are 'trying on' a not yet established personality style, which can be misinterpreted as the manipulative, false, and shallow features of the psychopathic offender"); id. at 229 (adolescents "focus excessively on present circumstances").

[18]Nurmi, supra note 7, at 27.

improves.[19]

The flip side of young adolescents' nascent sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. Nothing about fourteen-year-olds' character is permanent. They have years of development ahead, during which they can (and, in most cases, will) grow into moral, law-abiding adults.[20] In this regard:

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
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> . . . [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or not they are caught, arrested, prosecuted or sanctioned . . . .[21]

As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[22] For these reasons, adolescents fourteen and younger are a distinct group of young offenders who must be considered separately from older juveniles when evaluating whether a sentence of life imprisonment without parole is

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[19]Id. at 27–29.

[20]See supra note 15.

[21]Steinberg, supra note 12, at 478.

[22]See, e.g., Laurence Steinberg, Sandra Graham et al., Age Differences in Future Orientation and Delay Discounting, 80 Child Dev. 28, 28 (2009) [hereinafter Steinberg, Graham, et al., Future Orientation]; Laurence Steinberg & Kathryn C. Monahan, Age Differences in Resistance to Peer Influence, 43 Dev. Psycho. 1531, 1540 (2007); Steinberg, Cauffman, et al., supra note 11, at 1775–76.

cruel and unusual. By limiting its analysis to whether Graham invalidated sentences of life imprisonment without parole for all juveniles, the Arkansas Supreme Court mischaracterized the central issue in this case. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. 2011). Kuntrell's Eighth Amendment claim pertains only to whether fourteen-year-old children must be exempted from the penultimate punishment due to their inherent and substantial differences from adults and older teens.

2. The Law Recognizes the Critical Differences Between Fourteen-Year Old Children and Older Adolescents.

The differences in development between younger and older juveniles are reflected in the laws and holdings of the state legislatures, the state courts, Congress, and this Court. Each of these legal authorities has understood the need to make special provisions for children under fifteen.

The Arkansas legislature, like that of all other states, has enacted laws distinguishing between fourteen-year old children and older teenagers. These laws evidence the state's judgment that younger children lack the maturity and decision-making capacity necessary to make responsible choices about fundamental aspects of their personal lives. Unlike older juveniles, they are prohibited from driving, Ark. Stat. Ann. § 27-16-604; prevented from getting married without a court order, Ark. Stat. Ann. §§ 9-11-102 (a) (minimum age restrictions) - 103 (court order provisions); required to attend school, Ark. Stat. Ann. § 6-18-201; and allowed to work a range of jobs only under certain restrictions, see Ark. Stat. Ann. §§ 11-6-105–110. Similarly, the federal government strictly regulates the hours and conditions under which

fourteen-year olds may be employed. 29 U.S.C. §§ 203, 212, 213.

State courts have determined that sentencing decisions must take into account the differences between young children and older teenagers. For instance, Kentucky's highest court has held that imposing a sentence of life in prison without parole on two fourteen-year-olds convicted of rape was cruel and unusual punishment. Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968). The Nevada Supreme Court struck down the same sentence under the Eighth Amendment for a child under the age of fifteen who had been convicted of murder. Naovarath v. State, 779 P.2d 944, 948-49 (Nev. 1989).

In Stanford v. Kentucky, this Court distinguished younger adolescents from those over the age of fifteen, permitting sixteen- and seventeen-year-olds to be subjected to harsher punishments, including death. 492 U.S. 361, 380 (1989). While Stanford was later overruled by Roper insofar as it allowed the execution of the sixteen- and seventeen-year-olds, this Court has never abandoned the insight that there exists a constitutionally significant difference between young adolescents and older teenagers with respect to sentencing. See also Thompson v. Oklahoma, 487 U.S. 815, 834 (1988) (plurality opinion) (prohibiting the death penalty for children fifteen and under, in part because "[a]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive and less self-disciplined than adults" (quotation marks omitted) (emphasis added)). These precedents establish that fourteen-year-olds are substantially different from older teenagers in ways that are constitutionally relevant to sentencing.

3. The Singular Characteristics of Young Adolescents that Distinguish Them from Older Teens and Adults Are No Less Applicable to Homicide Offenses than to Other Crimes

The signature features of youth identified by the Court in Roper and reaffirmed in Graham are just as much in operation when a young adolescent commits a homicide offense as when he or she commits a nonhomicide offense. There is no reason to imagine that fatal acts committed by a child of thirteen or fourteen are typically less impulsive, more farsighted, more cognizant of likely consequences, less peer-influenced, or more susceptible to self-control than nonfatal criminal acts.

And, no matter what the precise nature of their crimes, children under fifteen "are more capable of change . . . and their actions are less likely to be evidence of irretrievably depraved character" than is the case with older teenagers and adults, Graham, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 570) (quotations omitted). As a class, young teens who fall into criminality have a greater potential to reform their character deficiencies as they advance in age and maturity. Id. (citing Roper, 543 U.S. at 570) (quotations omitted).

The Court's Eighth Amendment analysis of the permissible severity of any particular punishment includes consideration of the question "whether the challenged sentencing practice serves legitimate penological goals." Graham, 130 S. Ct. at 2026. Following the reasoning in Graham, it is apparent that the characteristics of fourteen-year-olds frustrate any plausible purpose for imposing the penultimately harsh, permanent sanction of life imprisonment without parole.

Life imprisonment without parole is the harshest penalty available under

Arkansas law for juvenile offenders. The Graham Court found that, while death sentences are unique, a sentence of life without parole also "alters the offender's life by a forfeiture that is irrevocable." Id. at 2027. Such a sentence "deprives the convict of the most basic liberties without giving hope of restoration." Id. Moreover, "[l]ife without parole is an especially harsh punishment for a juvenile," who will "serve more years and a greater percentage of his life in prison than an adult offender." Id. at 2028. For these reasons, Kuntrell's life without parole sentence constitutes an extremely harsh, final judgment that denies all hope for the future.

None of the generally recognized purposes of punishment is adequate to justify imposing such an endless, rigidly inflexible sentence on a young adolescent. "Retribution is a legitimate reason to punish," but "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." Graham, 130 S. Ct. at 2028. Both Roper and Graham recognized that, even with respect to older teens, "the case for retribution is not as strong with a minor as with an adult." Id. (quoting Roper, 543 U.S. at 571).

The deterrence rationale for punishment also fails in the case of young adolescents. Even with respect to older teens, the Court has recognized that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." Roper, 543 U.S. at 571. Teenagers' impulsivity and lack of future-orientation means that they are "less likely to take a possible punishment into consideration when making decisions." Graham, 130 S. Ct. at 2028–29. Again these observations are especially true of young adolescents. Given

that eighth graders struggle to imagine their lives only a few years into the future, it is unlikely that they would plan their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Moreover, testing of individuals from 10 and 30 years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals."[23]

"While incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts," Graham, 130 S. Ct. at 2029, it is insufficient to support making a permanent, unalterable judgment about a young adolescent whose character is as yet unformed. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Roper, 543 U.S. at 572. Younger adolescents have an even greater capacity for change than older teens, rendering it peculiarly unreliable and ill-advised for "the sentencer to make a judgment that the juvenile is incorrigible," Graham, 130 S. Ct. at 2029.

Finally, a life without parole sentence for a young adolescent "forswears altogether the rehabilitative ideal." Id. at 2030. Given the especially high potential for rehabilitation of young adolescents, such a denial of the "chance to demonstrate growth and maturity," id. at 2029, cannot be justified. Because none of the purposes

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[23]Steinberg, Graham et al., Future Orientation, supra note 22, at 36.

of punishment adequately supports a sentence of life without parole for a fourteen-year-old child, Kuntrell's constitutional claim to "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," id. at 2030, warrants review by this Court.

B. The Extreme Rarity With Which Fourteen-Year-Olds Are Sentenced to Life in Prison without Parole Dramatically Supports Kuntrell's Eighth Amendment Claim.

The determination whether a sentence is cruel and unusual must also take into account " objective indicia of national consensus." Graham, 130 S. Ct. at 2023. In this regard the Court has found that "[a]ctual sentencing practices are an important part of the . . . inquiry into consensus." Id. Kuntrell is one of only four fourteen-year-old children known to have been sentenced to life imprisonment without parole in the State of Arkansas.[24] Just 73 children age fourteen or younger have been sentenced to life imprisonment without parole in the entire United States.[25]

This number is substantially less than the 123 sentences which the Court in Graham found demonstrated that "[t]he sentencing practice now under consideration is exceedingly rare." 130 S. Ct. at 2023, 2026. It is also comparable to the number of sentences found indicative of a national consensus repudiating a sentencing practice in previous cases. When Roper recognized a national consensus against death

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[24]Neither Arkansas's Department of Corrections nor undersigned counsel's extensive research, see note 1, supra, could identify more than four children Kuntrell's age who have been sentenced to life imprisonment without parole in Arkansas. See also Equal Justice Initiative, Cruel and Unusual, supra note 1, at 20.

[25]See Cruel and Unusual, supra note 1, at 20.

sentences for juveniles, 72 juvenile offenders were under that sentence.[26] When Atkins v. Virginia, 536 U.S. 304 (2002), found a national consensus against death sentences for persons with mental retardation, it was estimated that one to three percent of the death-row population – roughly 71 people – were mentally retarded.[27]

The total of 73 young adolescents serving sentences of life without parole is particularly strong evidence of the rarity of these sentences for two reasons. First, as the Court noted in Graham, "a juvenile sentenced to life without parole is likely to live in prison for decades," and thus "these statistics likely reflect nearly all [young adolescent] offenders who have received a life without parole sentence stretching back many years." 130 S. Ct. at 2024. Second, these cases represent just a tiny fraction of cases in which people fourteen or younger might have received such sentences. According to the FBI's Uniform Crime Statistics, since 1995, 103,068 children fourteen or younger have been arrested for offenses that could potentially expose them to life without parole, and 1,878 of those children were arrested for homicides.[28] In same time period in Arkansas, 153 juveniles were arrested for murder or non-negligent

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[26]Victor L. Streib, Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – September 30, 2004 3 (2004), available at http://www.demaction.org/dia/organizations/ncadp/Affiliate/Toolkit/Resources/DeathPenalty/JuvDeathSept302004.pdf.

[27]See Atkins, 536 U.S. at 309 n.5; Death Penalty Information Center, Size of Death Row By Year, http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year (last visited Oct. 12, 2010) (showing 3,557 death row inmates in 2002).

[28]These number were compiled from data available at http://www.fbi.gov/ucr.

homicide.[29] However, only two fourteen-year-olds, about one percent of all arrested, including Kuntrell Jackson, have been sentenced to life imprisonment without parole for crimes committed during that time period.[30] Graham found that similar data supported a conclusion that the sentencing practice at issue was unusual. 130 S. Ct. at 2025.

Children of fourteen or younger are known to have been sentenced to life without parole in only eighteen states.[31] Thus, in the vast majority of states, no child of Kuntrell's age has been subjected to life imprisonment without the possibility of parole. That only a minority of states have imposed these sentences is strong evidence of a national consensus. See, e.g., Roper, 543 U.S. at 564–65; Atkins, 536 U.S. at 316. Moreover, in ten of the eighteen states which have sentenced children as young as fourteen to life without the possibility of parole, no more than one or two children have received that sentence.[32]

One of these eighteen states, Colorado, no longer allows the imposition of life

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[29]See U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States 338 (2004), available at http://www.fbi.gov/ucr/ucr.htm; id. at 328 (2003); id. at 292 (2002); id. at 292 (2001); id. at 274 (2000); id. at 270 (1999); id. at 268 (1998); id. at 280 (1997); id. at 272 (1996); id. at 266 (1995).

[30]The other two fourteen-year-olds' arrests predate 1995.

[31]Cruel and Unusual, supra note 1, at 20. Although this report indicates that there are nineteen states in which thirteen- and fourteen-year-olds have been sentenced to life without parole, there are now only eighteen because the only such sentence in California has recently been overturned. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009).

[32]Cruel and Unusual, supra note 1, at 20.

without parole on any juvenile. See Colo. Rev. Stat. § 17-22.5-104(IV). Texas also has formally abolished life without parole for all juveniles. See Tex. Penal Code Ann. § 12.31(b)(1). California courts have prohibited life without parole for children under sixteen. See In re Nunez, 93 Cal. Rptr. 3d 242 (Cal. Ct. App. 2009). The fact that these three states have moved away from sentencing young adolescents to die in prison reveals a distinct trend against imposing this sentence.

This strong evidence of a national consensus is not undermined by the fact that many states do not explicitly prohibit life without parole for fourteen-year-old children. Graham, 130 S. Ct. at 2025. State statutory schemes that theoretically permit a life-without-parole sentence for a fourteen-year-old child are typically the result of two separate legislative enactments: a provision authorizing life-without-parole sentences for adults, and a provision authorizing the transfer of fourteen-year-olds to adult court. This exogenous conjunction is insufficient to demonstrate that these states have made a deliberate judgment that such a sentence is appropriate, especially where – as is true in the vast majority of states – such a sentence has never actually been imposed. See Graham, 130 S. Ct. at 2025 ("[T]he fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences."); Thompson v. Oklahoma, 487 U.S. 815, 829 n.24 (1988) ("That these three States have all set a 15-year-old waiver floor for first-degree murder tells us that the States consider 15-year-olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), but tells us nothing

about the judgment these States have made regarding the appropriate punishment for such youthful offenders.").

The paucity of cases in which sentences of life imprisonment without parole have actually been imposed on fourteen-year-old children demonstrates that "[t]he sentencing practice now under consideration is exceedingly rare." Graham, 130 S. Ct. at 2026. The national consensus against such sentences strongly supports the conclusion that such sentences are cruel and unusual.

II. REVIEW SHOULD ALSO BE GRANTED TO DETERMINE WHETHER, CONSISTENTLY WITH GRAHAM v. FLORIDA, A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE CAN BE IMPOSED UPON A MURDER CONVICTION WHICH IS BASED SOLELY ON ACCESSORIAL-LIABILITY AND FELONY-MURDER PRINCIPLES, WITH NO SHOWING THAT THE JUVENILE OFFENDER KILLED OR INTENDED TO KILL ANYONE.

At Kuntrell's trial, the prosecution relied upon theories of robbery-murder and accessorial liability to obtain a conviction of homicide and of capital murder. These theories made it irrelevant whether Kuntrell committed the homicide himself or intended the victim's death. Accordingly, the prosecution acknowledged that Derrick Shields was the actual killer, and it did not undertake the burden of proving even that Kuntrell knew, let alone shared, Shields' homicidal intent. See Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011) (Danielson, J., joined by Corbin, J., dissenting) ("Jackson did not kill and any evidence of intent to kill was severely lacking."); see also id. (Brown, J., concurring) ("[Jackson] was convicted of a murder that occurred in the course of committing a felony – not deliberated or premeditated murder."). Under the felony- murder provisions of Arkansas Code §5-10-101

(a)(1)(A)(vi) and §5-10-101(a)(1)(B), the elements of the state's murder case against Kuntrell were simply that he knowingly participated in an armed robbery and that, during the course of the robbery and in furtherance of it, one of his co-defendants killed the victim in a manner evincing extreme indifference to human life.

It was undisputed that Kuntrell did not provide the gun used in the shooting, handle the gun at any point prior to or during the offense, or fire the fatal shot. See Jackson v. State, 194 S.W.3d 757, 758-59 (Ark. 2004) (summarizing facts of the crime). The most plausible inference from the State's evidence is that none of the three boys expected anyone to be killed: when the shot was fired, Kuntrell and his two older co-defendants ran away without taking any money. See id. at 759. The entire episode, while undeniably tragic, bore the hallmark of impulsivity, not premeditation.

A. A Life-Without-Parole Sentence for a Juvenile Who Was Not Convicted of Intentional Murder Appears Starkly at Odds with Graham.

Although the specific holding in Graham invalidated life-without-parole sentences only for nonhomicide offenses, the Court relied heavily on the rationale that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Graham, 130 S.Ct. at 2027 (emphasis added). The Court pointedly stated that, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Id. (emphasis added).

Kuntrell undeniably stands convicted of a homicide crime through the joint application of Arkansas' felony-murder and accessorial-liability rules. Those rules did

not require proof of an intent to kill – or even of an awareness of the likelihood of fatal consequences – in order to sustain his conviction. He fired no weapon, he possessed no weapon, he engaged in no physical violence toward the homicide victim throughout the course of the events that led up to one of his older companions suddenly shooting her. From the standpoint of individual culpability, his actions in connection with that crime cannot be meaningfully distinguished from those of Terrance Graham. Jackson, 2011 WL 478600 (Danielson, J., dissenting) ("Jackson's involvement in the robbery was no more, if not less than, Graham's involvement had been.") To the extent there are distinctions between Kuntrell's and Terrance Graham's respective degrees of involvement and responsibility, they suggest that Kuntrell was the less culpable of the two. Kuntrell was initially unaware that one of his co-defendants was armed; he at first elected to stay outside the store where the robbery took place, and he entered the store only after his co-defendant was already brandishing the gun. Jackson v. State, 194 S.W.3d at 758-59. Cf. Jackson v. Norris, 2011 WL 478600 (Danielson, J., dissenting) (noting that Kuntrell's "involvement in the robbery was limited").

B. A National Consensus Has Emerged Against Sentencing Juveniles to Life Without the Possibility of Parole for Unintentional Homicides.

The rarity of life-without-parole sentences for children under the age of fifteen who were convicted of homicides in cases where the state did not establish their intent to kill further demonstrates that Kuntrell's sentence is at odds with Graham. In Graham, the Court relied on the fact that only 123 juveniles of any age had been sentenced to life-without-parole for nonhomicide offenses to find that "[t]he sentencing

practice now under consideration is exceedingly rare. And 'it is fair to say a national consensus has developed against it.'" Id. at 2026 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)). Here, the evidence of consensus is even stronger than in Graham. Only twenty-one children under fifteen are known to have received a life-without-parole sentence for homicide offenses where the state did not establish intent to kill.

C. A Sentence of Life Without Parole for a Juvenile Who Did Not Intend to Kill Cannot be Justified under Any Valid Penological Goal.

Sentencing a juvenile who did not intend to kill to life without the possibility of parole does not "serve[] legitimate penological goals." Graham, 130 S.Ct. at 2026. Considering the degree of harm caused, felony murder is obviously a more serious crime than the nonhomicide offenses on which it is predicated; hence, it is traditionally and legitimately punished more severely. But the application of felony-murder liability to young children becomes problematic in the light of the differences between children and adults recognized in Roper and Graham. The felony- murder doctrine rests essentially on the idea that one who chooses to become involved in a potentially violent felony should reasonably anticipate injury to victims or bystanders. Society is therefore justified in holding the participating offenders responsible for any death that may occur, regardless of whether those who did not personally perform the lethal act specifically intended death. See Tyson v. Arizona, 481 U.S. 137, 159-60 (1987). As Graham implicitly recognizes, this rationale is incompatible with our modern understanding of juveniles. Juveniles as a group, and especially younger juveniles under the age of fifteen, have a significantly impaired ability to anticipate future

consequences.[33] For this reason, they are less able to recognize that their participation in a robbery may lead to someone's injury or death. Moreover, juveniles' poor impulse control and high susceptibility to peer influence inhibit their ability to withdraw from potentially deadly situations when they are encouraged into wrongdoing by others. See Graham, 130 S.Ct. at 2026.

These considerations severely undermine the penological justifications for sentencing a child who is only fourteen years old to life without the possibility of parole when that child did not intend to kill. Cf. Graham, 130 S.Ct. at 2030 (acknowledging the absence of penological justifications for sentencing children to life without parole for nonhomicides). Just as a child who does not commit a homicide must be considered less amenable to deterrence, Graham, 130 S.Ct. at 2028 (citing Roper, 543 U.S. at 571), so, too, must be a child who unintentionally participated in a homicide. Cf. Ermund v. Florida, 458 U.S. 782, 798-99 (1982) ("We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably

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[33]See B. Luna, The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior 249, 252-56 (F. Aboitiz & D. Cosmelli eds., 2009) (cognitive functions that underlie decision-making are undeveloped in early teens: processing speed, response inhibition, and working memory do not reach maturity until about 15); Elizabeth Cauffman & Laurence Steinberg, (Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 Behav. Sci. & Law 741, 756 (2000) (significant gains in psychosocial maturity take place after 16); Leon Mann et al., Adolescent Decision-Making, 12 J. Adolescence 265, 267-70 (1989) (13-year-olds show less knowledge, lower self-esteem as decision-maker, produce less choice options, and are less inclined to consider consequences than 15-year-olds); Jari-Erik Nurmi, How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning, 11 Dev. Rev. 1, 12 (1991) (planning based on anticipatory knowledge, problem definition, and strategy selection used more frequently by older adolescents than younger ones)

deter one who does not kill and has no intention or purpose that life will be taken.").

By similar logic, the doubly reduced moral culpability of children who do not intend to kill undermines retribution as a rationale for life-without-parole sentences. See Graham, 130 S.Ct. at 2028; cf. Enmund, 458 U.S. at 800-01. And though a child who does not personally cause death but participates in dangerous criminal activity may warrant incapacitation,"it does not follow that he would be a risk to society for the rest of his life." Graham, 130 S.Ct. at 2029. Finally, the Court unequivocally found in Graham that, for young offenders like Kuntrell, "[a] sentence of life imprisonment without parole . . . cannot be justified by the goal of rehabilitation." Id. at 2029-30. The failure of penological theory to justify Kuntrell's sentence of life without parole for an unintentional killing brings that sentence into an acute tension with Graham that only this Court can authoritatively resolve.

III. THE COURT SHOULD ALSO GRANT THIS PETITION TO CONSIDER WHETHER THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE FORBIDS THE IMPOSITION OF A MANDATORY SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE ON A FOURTEEN-YEAR-OLD CHILD – A PROCEDURE WHICH PRECLUDES THE SENTENCER FROM TAKING THE CHILD'S AGE OR ANY OTHER MITIGATING CIRCUMSTANCES INTO CONSIDERATION.

Once the jury found Kuntrell guilty of capital murder, a life-without-parole sentence was mandatory. Ark. Code §5-10-101 (c)(1). Arkansas law precluded the trial judge from considering Kuntrell's young age, his relatively minimal role in the offense, his past life history, his future life potentialities, or anything else in mitigation of the statutorily prescribed punishment of imprisonment until death. As the two dissenting justices on the Arkansas Supreme Court recognized, the imposition of a sentence of life

imprisonment without parole on a fourteen-year-old child absent consideration of whether the sentence is proportionate to the crime and to the child cannot readily be squared with Graham. Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb 9, 2011) (Danielson, J., joined by Corbin, J., dissenting) ("Also of great concern to me is that once Jackson was convicted, the circuit court had no discretion in sentencing. At the time of sentencing, the circuit court could not consider the defendant's age or any other mitigating circumstances – the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility of parole.") (citing Graham, 130 S.Ct. At 2031); see also id. (Brown, J., concurring) ("I agree with Jackson's argument that this state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life without the possibility of parole.").

Although the sentence at issue in Graham was not mandatory, the Graham Court's reasoning logically implicates mandatory sentences. Florida and its state amici in Graham defended life-without-parole sentences for juveniles by asserting that Florida law and the laws of other states gave adequate consideration to a young offender's age through the screening process by which children were designated for trial either in juvenile court or, alternatively, as adults. Graham, 130 S.Ct. at 2030-31. In addition, before condemning Graham to life in prison, the trial judge held a sentencing hearing at which he determined that Graham's sentencing range was between five years and life without parole.

Despite these transfer procedures and the trial court's sentencing options, this

Court found that Florida's laws were inadequate to assure the constitutionally requisite consideration of a juvenile offender's age as a factor in determining whether he or she should be consigned to lifelong incarceration. The defect in Florida's juvenile sentencing scheme, according to the Court, was that it was "insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." Graham, 130 S.Ct. at 2031; see also Roper v. Simmons, 543 U.S. 551, 572-73 (2005) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."); Naovarath v. Nevada, 779 P.2d 944, 946-47 (Nev. 1989) ("Children are and should be judged by different standards from those imposed upon mature adults."). The Graham Court explained that "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S.Ct. at 2031.

Because Kuntrell's sentence was mandatory, Arkansas law allowed less consideration of his moral culpability than the Florida system invalidated by Graham. At a minimum, this Court's reasoning in Graham implies the requirement that some consideration be given to a juvenile's age as bearing on the appropriate punishment for his or her crime before the child can be condemned to spend the rest of his or her life in prison. Cf. Graham, 130 S.Ct. at 2042 (Roberts, J., concurring) ("[Graham] was only 16 years old, and under our Court's precedents, his youth is one factor, among others, that should be considered in deciding whether his punishment was

unconstitutionally excessive."); id. at 2055 (Thomas, J., dissenting) ("The integrity of our criminal justice system depends on the ability of citizens to stand between the defendant and an outraged public and dispassionately determine his guilt and the proper amount of punishment based on the evidence presented."); see also Andrews v. State, 329 S.W.3d 369, 388 (Mo. 2010) (Wolff, J. dissenting) ("The imposition of a life sentence without parole-without consideration of Andrews' age-fails to ensure that Andrews' sentence is proportional to his crime. As such, the Missouri sentencing mandate is flawed and violates the Eighth Amendment.").

In the capital-sentencing context, from which this Court derived the constitutional framework it relied upon in Graham, this Court has insisted that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Roberts v. Louisiana, 431 U.S. 633 (1977); Summer v. Shuman, 483 U.S. 66 (1987). That requirement has not been extended to life-without-parole sentencing for adults, see Harmelin v. Michigan, 501 U.S. 957, 995–96 (1996), and nothing in Kuntrell's submissions to this Court suggests that it should be. The teaching of Graham, however, is that imprisoning a child for his or her entire natural life, with no hope that he or she can ever be considered for release, shares the irrevocability and much of the life-extinguishing severity of a death sentence, and is therefore subject to some of the same Eighth Amendment safeguards. When, as in

Kuntrell's case, a state imposes such a terminal imprisonment-until-death sentence under procedures that preclude any consideration of the young offender's age or other mitigating circumstances, it is Graham, not Harmelin, that dictates the constitutional rule of decision. Certiorari should accordingly be granted to correct the view of the Arkansas court below that, in connection with the sentencing of a fourteen-year-old boy, "the life-imprisonment punishment . . . mandated by the legislature . . . [has] been determined by the Supreme Court in Harmelin v. Michigan [citation omitted] as not violative of the Eighth Amendment," Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb 9, 2011).

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant a writ of certiorari to the Arkansas Supreme Court.

Respectfully submitted,

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OPPOSITION BRIEF

NO. 10-9647

IN THE SUPREME COURT OF THE UNITED STATES

KUNTRELL JACKSON, *Petitioner*

v.

RAY HOBBS, Director

Arkansas Department of Correction, *Respondent*

On Petition for Writ of Certiorari to the

Supreme Court of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a fourteen-year-old defendant convicted of capital murder violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the Arkansas legislature has put in place a statutory mechanism for considering the reduced criminal culpability of a juvenile offender?
2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, but was found to have participated as an accomplice?
3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old defendant as a result of a mandatory sentencing scheme for capital murder after the offender's age and other circumstances have been considered in whether to transfer the case to juvenile court?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Beulah v. State, 344 Ark. 528, 42 S.W.3d 461 (2001 4

Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011 (2010) 5

Jackson v. State, No. CA 02-535, slip op. 2003 WL 193412 (Ark. App. Jan. 29, 2003) 1

Jackson v. State, 359 Ark. 87, 194 S.W.3d 757 (2004) 5

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983) 6

Witherspoon v. State, 72 Ark. App. 151, 46 S.W.3d 549 (2001) 4

STATUTES

28 U.S.C. §1257(a) 1

Ark. Code Ann. § 9-27-101 et seq. 1

Ark. Code Ann. § 9-27-318(g) (Repl. 2002) 3

Ark. Code Ann. § 9-27-318(h) 4

Ark. Code Ann. § 9-27-318(i) 4

Ark. Code Ann. § (c)(2)(A) 4

OTHER AUTHORITIES

"Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation," P. Annino, D. Rasmussen, C. Boehme Rice, Public Interest Law Center, College of Law, Florida State University, p.4 (September 14, 2009) 6

JURISDICTION

The judgment of the Arkansas Supreme Court was entered on February 9, 2011. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondent relies on the description of the proceedings contained in the opinion below and incorporates that description by reference. Respondent also relies on the proceeding of the Arkansas Court of Appeals in *Jackson v. State*, No. CA 02-535, slip op. 2003 WL 193412 (Ark. App. Jan. 29, 2003), that considered the denial of the petitioner's motion to transfer his case to juvenile court.

REASONS FOR DENYING THE WRIT

The Respondent agrees that, in the context of the American criminal justice system, there are valid reasons for taking into account the different characteristics of juvenile offenders. This is the reason why Arkansas has an extensive juvenile code which considers the ages of juvenile offenders as well as the various crimes that they may commit. *See* Ark. Code Ann. § 9-27-101 et seq. In the instant case, the petitioner availed himself of the very procedures of that code,

seeking an individualized determination as to his prospects for rehabilitation and the danger that he posed to society. Even the petitioner's own authority states that "a small percentage [of juvenile offenders] – between five and ten percent, according to most studies – become chronic offenders." (Pet. at 16) It is in that context that the criminal justice system must, and does, deal with juvenile offenders. Clearly, the Arkansas legislature has, within its statutory scheme, considered whether a life-without-parole sentence for a homicide offense is appropriate. The Arkansas Court of Appeals review of the facts adduced at the transfer hearing wherein the petitioner sought adjudication in the juvenile system, are set out in its opinion and bear repeating here:

> Kuntrell Jackson was charged in the criminal division of circuit court with capital murder. Appellant was fourteen years old at the time the offense was allegedly committed. This is an interlocutory appeal from an order denying appellant's motion to transfer his case to juvenile court.
>
> On November 18, 1999, Laurie Troup was working at Movie Magic, a video store in Blytheville, when appellant and two other juveniles entered the store and demanded that she give them money. When Troup refused to hand over the money, she was shot in the face with a sawed-off shotgun. The juveniles fled without taking any money.
>
> The juveniles were apprehended in March 2001, and all three gave incriminating statements to police. According to their statements, which were introduced at the transfer hearing, appellant and his cohorts planned to rob the video store because they wanted money. Appellant contended that one of his accomplices supplied the weapon and fired the fatal shot and that he was the lookout.
>
> In addition to the juveniles' statements to police, the circuit judge was also presented with appellant's juvenile arrest history at the transfer hearing. In February 2000, appellant was adjudicated delinquent for shoplifting, stealing two cars, and attempting to steal a third car. While on probation less than a month later, appellant was arrested for committing two counts of auto theft. In October 2000, appellant was adjudicated delinquent for theft by receiving a vehicle, criminal trespass, and fleeing. He was committed to the Division of Youth Services as a serious offender.

The results of a forensic psychiatric evaluation were also considered by the circuit judge. The psychologist found that appellant appeared to understand the charges against him and found no psychiatric impairment that would have caused him to be unable to conform his behavior to the requirements of the law at the time of the offense.

At the transfer hearing, Jack Wallace, a juvenile intake officer, testified that there was no rehabilitation program available in the juvenile system at that time in the event appellant was found guilty of capital murder.

In determining whether to retain jurisdiction or to transfer the case, the circuit judge must consider the following factors pursuant to Ark. Code Ann. § 9-27-318(g) (Repl. 2002):

(1) The seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in the criminal division of circuit court;

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;

(4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;

(5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;

(6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

(7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court which are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction;

(8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

In its order denying appellant's motion to transfer, the circuit court relied on the first nine factors. At the hearing, the circuit judge noted the seriousness of the offense and gave due consideration to the fact that the offense involved a firearm, was for pecuniary gain, and endangered the life of another. The circuit court's decision on whether to transfer the case to juvenile court will not be reversed unless the decision is clearly erroneous. *Witherspoon v. State*, 72 Ark. App. 151, 46 S.W.3d 549 (2001).

Appellant argues on appeal to this court that society would be better served if he were prosecuted in the juvenile division of the circuit court with extended juvenile jurisdiction where he could possibly be rehabilitated rather than transferring his case to the criminal division where he will be tried as an adult and could face life without parole. Appellant maintains that he was only seventeen days beyond his fourteenth birthday at the time of the alleged offense and lacks maturity that could be gained with time and rehabilitative services. He points out that his arrest history consisted of property crimes and was not indicative of a propensity for crimes against persons. Finally, appellant argues that he was not the leader of the group.

Arkansas Code Annotated (c)(2)(A) provides that the criminal division of circuit court and the juvenile division of circuit court have concurrent jurisdiction, and a prosecuting attorney may charge a juvenile in either division when a case involves a juvenile fourteen or fifteen years old when he engages in conduct that, if committed by an adult, would be capital murder. Upon a finding by the criminal division of circuit court that a juvenile age fourteen or fifteen and charged with crimes in subdivision (c)(2) of this section should be transferred to the juvenile division of circuit court, the judge shall enter an order to transfer as an extended juvenile jurisdiction case. Ark. Code Ann. § 9-27-318(i). Therefore, the case cannot become an extended juvenile jurisdiction case unless it is transferred to the juvenile division of circuit court. The trial court must find by clear and convincing evidence that the juvenile should be tried as an adult. Ark. Code Ann. § 9-27-318(h).

There is nothing in the record that would suggest that the circuit judge failed to consider all of the relevant factors in section 9-27-318(g). The circuit court is not required to enumerate all ten factors in its written findings. *See Beulah v. State*, 344 Ark. 528, 42 S.W.3d 461 (2001). The circuit court's failure to specifically mention certain evidence presented by the appellant in its order does not mean that the court ignored the evidence or failed to consider it. *Id.* We cannot say that the circuit court clearly erred in its decision to retain jurisdiction over this appellant.

Jackson, slip op. at 1-3.

Following his trial and conviction for capital murder, the petitioner's appeal was considered by the Arkansas Supreme Court. In its opinion, the court noted that testimony adduced at trial indicated that the petitioner, once the robbery was in progress, admonished the clerk of the store that "we ain't playin'." *Jackson v. State*, 359 Ark. 87, 91, 194 S.W.3d 757, 760 (2004).

Now, in seeking certiorari, the petitioner, understandably, seeks a broad categorical rule that would ignore any details regarding his criminal history, and, simply by virtue of his age, prevent the imposition of a life sentence for his participation in the commission of a homicide offense. This Court's opinion in *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010), issued a categorical rule with regard to the imposition of life-without-parole sentences for juveniles committing *non*-homicide offenses and certainly acknowledged in its holding that "there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather the constitutionality of such sentences depends on the particular crimes for which they are imposed." *Graham* at ___, 130 S.Ct. at 2041 (Roberts, C.J., concurring) (emphasis in original).

Understandably, the petitioner seeks to have a new categorical rule that would include, not just his age group, but his crime. However, *Graham* took as its foundational underpinning that "death was different," irrespective of the role one or more individuals took in carrying it out. The first study cited in this Court's opinion, *Id.* at 2023, defined the terms under which the decision was cast. " '[N]on-homicide' is any criminal conviction where the juvenile is not convicted of any type or degree of homicide. 'Non-homicide' does not include any convictions for attempted homicides or any convictions for felony murder, where the juvenile did not kill anyone but was convicted as an accomplice to a murder. Individuals convicted of attempted

homicide or felony murder are defined as homicide offenders." *See* "Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation," P. Annino, D. Rasmussen, C. Boehme Rice, Public Interest Law Center, College of Law, Florida State University, p.4 (September 14, 2009).[1]

To take the petitioner's approach at this time would be to dispense with the proportionality review that compares "the gravity of the offense and the harshness of the penalty." *Solem v. Helm*, 463 U.S. 277, 290-291, 103 S.Ct. 3001, 3010 (1983). The court settled only a year ago on a conclusion that the harshness of life-without-parole sentences is appropriate for the gravity of homicide offenses like the petitioner's, despite his youth at the time.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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[1] The study can be found at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop 092009.pdf. (Last accessed 6/1/2011)

NO. 10-9647

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v.

RAY HOBBS, Director

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TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 1

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Beulah v. State, 344 Ark. 528, 42 S.W.3d 461 (2001 4

Graham v. Florida, ___ U.S. ___, 130 S.Ct. 2011 (2010) 5

Jackson v. State, No. CA 02-535, slip op. 2003 WL 193412 (Ark. App. Jan. 29, 2003) 1

Jackson v. State, 359 Ark. 87, 194 S.W.3d 757 (2004) 5

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983) 6

Witherspoon v. State, 72 Ark. App. 151, 46 S.W.3d 549 (2001) 4

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28 U.S.C. §1257(a) 1

Ark. Code Ann. § 9-27-101 et seq. 1

Ark. Code Ann. § 9-27-318(g) (Repl. 2002) 3

Ark. Code Ann. § 9-27-318(h) 4

Ark. Code Ann. § 9-27-318(i) 4

Ark. Code Ann. § (c)(2)(A) 4

OTHER AUTHORITIES

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REASONS FOR DENYING THE WRIT

The Respondent agrees that, in the context of the American criminal justice system, there are valid reasons for taking into account the different characteristics of juvenile offenders. This is the reason why Arkansas has an extensive juvenile code which considers the ages of juvenile offenders as well as the various crimes that they may commit. *See* Ark. Code Ann. § 9-27-101 et seq. In the instant case, the petitioner availed himself of the very procedures of that code,

seeking an individualized determination as to his prospects for rehabilitation and the danger that he posed to society. Even the petitioner's own authority states that "a small percentage [of juvenile offenders] – between five and ten percent, according to most studies – become chronic offenders." (Pet. at 16) It is in that context that the criminal justice system must, and does, deal with juvenile offenders. Clearly, the Arkansas legislature has, within its statutory scheme, considered whether a life-without-parole sentence for a homicide offense is appropriate. The Arkansas Court of Appeals review of the facts adduced at the transfer hearing wherein the petitioner sought adjudication in the juvenile system, are set out in its opinion and bear repeating here:

> Kuntrell Jackson was charged in the criminal division of circuit court with capital murder. Appellant was fourteen years old at the time the offense was allegedly committed. This is an interlocutory appeal from an order denying appellant's motion to transfer his case to juvenile court.
>
> On November 18, 1999, Laurie Troup was working at Movie Magic, a video store in Blytheville, when appellant and two other juveniles entered the store and demanded that she give them money. When Troup refused to hand over the money, she was shot in the face with a sawed-off shotgun. The juveniles fled without taking any money.
>
> The juveniles were apprehended in March 2001, and all three gave incriminating statements to police. According to their statements, which were introduced at the transfer hearing, appellant and his cohorts planned to rob the video store because they wanted money. Appellant contended that one of his accomplices supplied the weapon and fired the fatal shot and that he was the lookout.
>
> In addition to the juveniles' statements to police, the circuit judge was also presented with appellant's juvenile arrest history at the transfer hearing. In February 2000, appellant was adjudicated delinquent for shoplifting, stealing two cars, and attempting to steal a third car. While on probation less than a month later, appellant was arrested for committing two counts of auto theft. In October 2000, appellant was adjudicated delinquent for theft by receiving a vehicle, criminal trespass, and fleeing. He was committed to the Division of Youth Services as a serious offender.

The results of a forensic psychiatric evaluation were also considered by the circuit judge. The psychologist found that appellant appeared to understand the charges against him and found no psychiatric impairment that would have caused him to be unable to conform his behavior to the requirements of the law at the time of the offense.

At the transfer hearing, Jack Wallace, a juvenile intake officer, testified that there was no rehabilitation program available in the juvenile system at that time in the event appellant was found guilty of capital murder.

In determining whether to retain jurisdiction or to transfer the case, the circuit judge must consider the following factors pursuant to Ark. Code Ann. § 9-27-318(g) (Repl. 2002):

(1) The seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender or in the criminal division of circuit court;

(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;

(3) Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;

(4) The culpability of the juvenile, including the level of planning and participation in the alleged offense;

(5) The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;

(6) The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;

(7) Whether there are facilities or programs available to the judge of the juvenile division of circuit court which are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction;

(8) Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;

(9) Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and

(10) Any other factors deemed relevant by the judge.

In its order denying appellant's motion to transfer, the circuit court relied on the first nine factors. At the hearing, the circuit judge noted the seriousness of the offense and gave due consideration to the fact that the offense involved a firearm, was for pecuniary gain, and endangered the life of another. The circuit court's decision on whether to transfer the case to juvenile court will not be reversed unless the decision is clearly erroneous. *Witherspoon v. State*, 72 Ark. App. 151, 46 S.W.3d 549 (2001).

Appellant argues on appeal to this court that society would be better served if he were prosecuted in the juvenile division of the circuit court with extended juvenile jurisdiction where he could possibly be rehabilitated rather than transferring his case to the criminal division where he will be tried as an adult and could face life without parole. Appellant maintains that he was only seventeen days beyond his fourteenth birthday at the time of the alleged offense and lacks maturity that could be gained with time and rehabilitative services. He points out that his arrest history consisted of property crimes and was not indicative of a propensity for crimes against persons. Finally, appellant argues that he was not the leader of the group.

Arkansas Code Annotated (c)(2)(A) provides that the criminal division of circuit court and the juvenile division of circuit court have concurrent jurisdiction, and a prosecuting attorney may charge a juvenile in either division when a case involves a juvenile fourteen or fifteen years old when he engages in conduct that, if committed by an adult, would be capital murder. Upon a finding by the criminal division of circuit court that a juvenile age fourteen or fifteen and charged with crimes in subdivision (c)(2) of this section should be transferred to the juvenile division of circuit court, the judge shall enter an order to transfer as an extended juvenile jurisdiction case. Ark. Code Ann. § 9-27-318(i). Therefore, the case cannot become an extended juvenile jurisdiction case unless it is transferred to the juvenile division of circuit court. The trial court must find by clear and convincing evidence that the juvenile should be tried as an adult. Ark. Code Ann. § 9-27-318(h).

There is nothing in the record that would suggest that the circuit judge failed to consider all of the relevant factors in section 9-27-318(g). The circuit court is not required to enumerate all ten factors in its written findings. *See Beulah v. State*, 344 Ark. 528, 42 S.W.3d 461 (2001). The circuit court's failure to specifically mention certain evidence presented by the appellant in its order does not mean that the court ignored the evidence or failed to consider it. *Id.* We cannot say that the circuit court clearly erred in its decision to retain jurisdiction over this appellant.

Jackson, slip op. at 1-3.

Following his trial and conviction for capital murder, the petitioner's appeal was considered by the Arkansas Supreme Court. In its opinion, the court noted that testimony adduced at trial indicated that the petitioner, once the robbery was in progress, admonished the clerk of the store that "we ain't playin'." *Jackson v. State*, 359 Ark. 87, 91, 194 S.W.3d 757, 760 (2004).

Now, in seeking certiorari, the petitioner, understandably, seeks a broad categorical rule that would ignore any details regarding his criminal history, and, simply by virtue of his age, prevent the imposition of a life sentence for his participation in the commission of a homicide offense. This Court's opinion in *Graham v. Florida*, ___ U.S. ___, 130 S.Ct. 2011 (2010), issued a categorical rule with regard to the imposition of life-without-parole sentences for juveniles committing *non*-homicide offenses and certainly acknowledged in its holding that "there is nothing *inherently* unconstitutional about imposing sentences of life without parole on juvenile offenders; rather the constitutionality of such sentences depends on the particular crimes for which they are imposed." *Graham* at ___, 130 S.Ct. at 2041 (Roberts, C.J., concurring) (emphasis in original).

Understandably, the petitioner seeks to have a new categorical rule that would include, not just his age group, but his crime. However, *Graham* took as its foundational underpinning that "death was different," irrespective of the role one or more individuals took in carrying it out. The first study cited in this Court's opinion, *Id.* at 2023, defined the terms under which the decision was cast. " '[N]on-homicide' is any criminal conviction where the juvenile is not convicted of any type or degree of homicide. 'Non-homicide' does not include any convictions for attempted homicides or any convictions for felony murder, where the juvenile did not kill anyone but was convicted as an accomplice to a murder. Individuals convicted of attempted

homicide or felony murder are defined as homicide offenders." *See* "Juvenile Life without Parole for Non-Homicide Offenses: Florida Compared to the Nation," P. Annino, D. Rasmussen, C. Boehme Rice, Public Interest Law Center, College of Law, Florida State University, p.4 (September 14, 2009).[1]

To take the petitioner's approach at this time would be to dispense with the proportionality review that compares "the gravity of the offense and the harshness of the penalty." *Solem v. Helm*, 463 U.S. 277, 290-291, 103 S.Ct. 3001, 3010 (1983). The court settled only a year ago on a conclusion that the harshness of life-without-parole sentences is appropriate for the gravity of homicide offenses like the petitioner's, despite his youth at the time.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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BY: _____

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[1] The study can be found at http://www.law.fsu.edu/faculty/profiles/annino/Report_juvenile_lwop 092009.pdf. (Last accessed 6/1/2011)

No. 10-9647

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2010

KUNTRELL JACKSON **PETITIONER**

V.

RAY HOBBS, Director of
ARKANSAS DEPARTMENT OF CORRECTION **RESPONDENT**

CERTIFICATE OF SERVICE

I, Kent G. Holt, depose and say that I am an attorney in the office of Dustin McDaniel, Arkansas Attorney General, and am attorney of record for Ray Hobbs, Director, Arkansas Department of Correction, respondent herein, and that on June 1, 2011, pursuant to the Rules of the Supreme Court, I served two copies of the attached ***Respondent's Brief in Opposition*** on the petitioner herein as follows:

> By mailing two (2) copies in a duly addressed envelope, with first class postage prepaid, to Bryan A. Stevenson, Counsel of Record, Alicia A. D'Addario, Brandon J. Buskey, Equal Justice Initiative, 122 Commerce Street, Montgomery AL 36104

All parties required to be served have been served.

DATED: June 1, 2011

Respectfully submitted,

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REPLY BRIEF

No. 10-9647

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010

KUNTRELL JACKSON, Petitioner,

v.

STATE OF ARKANSAS, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

June 13, 2011

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

As laid out in detail in Kuntrell Jackson's petition, this Court should grant review in this case to address important constitutional questions left open by this Court's decisions in Roper v. Simmons, 543 U.S. 551 (2005), and Graham v. Florida, 130 S. Ct. 2011 (2010), regarding the imposition of a mandatory life-without-parole sentence on a fourteen-year-old child convicted of felony murder.

Arkansas does not contest any of the basic facts underlying Kuntrell's petition, including that Kuntrell was only fourteen-year-olds old at the time of the underlying offense and that he played only a minimal role as an accomplice in that offense. (Pet. Cert. 4–6.) Nor does Arkansas dispute the extreme rarity of these sentences; only seventy-three children Kuntrell's age or younger have been sentenced to life without parole in only eighteen states. (Pet. Cert. 3–4.) Finally, Arkansas does not challenge the fact that there are significant psychosocial, neurological, and legal differences between fourteen-year-olds and older teens and adults. (Pet. Cert. 11–18.)

Petitioner submits only one brief point in response to Respondent's Brief in Opposition, which relies heavily on the state court's decision not to try Kuntrell as a juvenile. This Court has repeatedly rejected the argument that the decision to transfer a child from juvenile court to adult criminal court is relevant to the propriety of imposing extreme sentences on children. This argument was made in Graham, and

this Court found that "the [transfer] provisions the State notes are, nonetheless, by themselves insufficient to address the constitutional concerns at issue." 130 S. Ct. at 2031.

This Court has made clear that there are a number of other reasons for trying serious juvenile offenders as adults beyond subjecting them to the harshest possible adult punishments:

> The length or conditions of confinement available in the juvenile system, for example, might be considered inappropriate for serious crimes or for some recidivists. Similarly, a state legislature might conclude that very dangerous individuals, whatever their age, should not be confined in the same facility with more vulnerable juvenile offenders.

Thompson v. Oklahoma, 487 U.S. 815, 850 (1988) (O'Connor, J. concurring); see also id. at 826 n.24 (Stevens, J. plurality op.) (finding existence of statutes permitting trial as an adult "tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders."); see also Graham, 130 S. Ct. at 2025.

None of the considerations cited by Respondent that went into the transfer decision could be considered by the trial judge at the time that he sentenced Kuntrell Jackson to life imprisonment without parole. Even if states may constitutionally decide to try children in adult criminal court, a fourteen-year-old's young age is still constitutionally relevant to the ultimate sentence that is imposed.

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court grant a writ of certiorari to the Arkansas Supreme Court.

Respectfully submitted,

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June 13, 2011

JOINT APPENDIX

No. 10-9647

In The
Supreme Court of the United States

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arkansas

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed March 21, 2011
Certiorari Granted November 7, 2011

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TABLE OF CONTENTS

Page

Relevant docket entries, Circuit Court of Jefferson County, Arkansas, Case No. CV-2008-28-2 1

Relevant docket entries, Supreme Court of Arkansas, Case No. 09-145 2

Petition for Writ of Habeas Corpus, filed in the Circuit Court of Jefferson County, Arkansas, on January 8, 2008 4

Excerpts from Appendix to Petition for Writ of Habeas Corpus, filed in the Circuit Court of Jefferson County, Arkansas, on January 8, 2008 41

Felony Information, filed in the Circuit Court for the Chickasawba District of Mississippi County, Arkansas, *State v. Jackson*, Case No. CR-2001-106(B), on April 18, 2001 42

Excerpts of trial testimony of Travis Booker from transcript of proceedings on June 18, 2003, in the Circuit Court for the Chickasawba District of Mississippi County, Arkansas, *State v. Jackson*, Case No. CR-2001-106(B) 44

Excerpts of closing argument of Deputy Prosecuting Attorney Curtis Walker from transcript of proceedings on June 19, 2003, in the Circuit Court for the Chickasawba District of Mississippi County, Arkansas, *State v. Jackson*, Case No. CR-2001-106(B) 52

TABLE OF CONTENTS – Continued

Page

Sentencing proceedings from transcript of proceedings on June 19, 2003, in the Circuit Court for the Chickasawba District of Mississippi County, Arkansas, *State v. Jackson*, Case No. CR-2001-106(B).....53

Judgment and Commitment Order, filed in the Circuit Court for the Chickasawba District of Mississippi County, Arkansas, *State v. Jackson*, Case No. CR-2001-106(B), on June 19, 2003.....58

Affidavit of Douglas Jackson, executed January 7, 2008.....64

Affidavit of Porchala Jackson, executed January 7, 2008.....69

Order Dismissing Petition for Writ of Habeas Corpus, Circuit Court of Jefferson County, Arkansas, dated September 17, 2008.....72

Opinion of the Supreme Court of Arkansas, dated February 9, 2011.....77

Order of the United States Supreme Court granting certiorari and permission to proceed *in forma pauperis* and ordering case argued in tandem with *Miller v. Alabama*, No. 10-9646, dated November 7, 2011.....90

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS

Case No. CV-2008-28-2

Relevant Docket Entries

1/8/08	Petition for Writ of Habeas Corpus and Appendix filed
1/8/08	Motion to Proceed In Forma Pauperis filed
1/8/08	Order Granting Motion to Proceed In Forma Pauperis
1/28/08	Motion to Dismiss Petition for Writ of Habeas Corpus and Supporting Brief filed
2/12/08	Opposition to Respondent's Motion to Dismiss Petition for Writ of Habeas Corpus filed
2/20/08	Order Setting Non-Jury Trial 6/25/08 at 9:30 a.m.
6/4/08	Order Resetting Hearing 6/25/08 at 9:30 a.m.
9/17/08	Order
10/16/08	Notice of Appeal filed

Supreme Court of Arkansas

Docket

Case Number 09-145 filed at this court on 02/13/2009

KUNTRELL JACKSON
V
LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION

03/01/2011 Mandate to Clerk

02/09/2011 Majority Opinion Rendered

ACTION = Affirmed
Opinion Date – 02/09/11 Consist of 0 pages,
Cite Number – Publish – yes
Robert Laidlaw Brown – WRITING
Concurs
Concurs
Karen Reneé Baker – WRITING
Affirmed
Paul Edward Danielson – WRITING
Dissents
Dissent
Affirmed. Brown, J., concurs. Corbin and Danielson, JJ., dissent.

01/27/2011 Case Submitted

09/14/2010 Brief Filed Timely – Larry Norris Dir. Dept Correction

08/23/2010 Brief Filed Timely – Kuntrell Jackson

06/17/2010 Motion to File Brief on the Application of Gr
ACTION = GRANTED on 08/06/10
Appellant's motion to file a brief on the application of Graham v. Florida is granted.
Appellant's brief is due August 21, 2010. Appellee's brief is due 15 days after appellant's brief is filed.

06/12/2009
Response to motion to stay proceedings pending decision by the United States Supreme Court.

06/02/2009 Motion to Stay Proceeding Pending Decision by
ACTION = DENIED on 06/25/09
Appellant's motion to stay proceedings pending decision by the United States Supreme Court is denied.

06/02/2009 Reply Brief Filed Kuntrell Jackson

05/18/2009 Brief Filed Timely – Larry Norris Dir. Dept Correction

03/31/2009 Request for Oral Argument – Kuntrell Jackson
ACTION = DENIED on 05/26/09

03/31/2009 Brief Filed Timely – Kuntrell Jackson

02/11/2009 Record Lodged
Number of Volumes 1

No. [CV-08-28-2 (Wyatt)]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT-WEST JEFFERSON COUNTY

KUNTRELL JACKSON, Petitioner,

v.

LARRY NORRIS, in his capacity as DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTIONS, Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

[Filed Jan. 8, 2008]

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT-WEST
JEFFERSON COUNTY

STATE OF ARKANSAS ex rel. KUNTRELL JACKSON,	*	
Petitioner,	*	
vs.	*	
LARRY NORRIS, in his capacity as DIRECTOR OF THE ARKANSAS DEPARTMENT OF CORRECTIONS,	*	Case No. _____
Respondent.	*	

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Kuntrell Jackson was sentenced to life imprisonment without the possibility of parole for a crime that occurred when he was just fourteen years old. Kuntrell, who is now incarcerated at the Maximum Security Unit of the Arkansas Department of Correction in Tucker, Arkansas, by Respondent, Director Larry Norris, respectfully petitions this Court under Arkansas Code § 16-112-101 *et seq.*, for relief from his unconstitutional sentence.

INTRODUCTION

1. This petition for writ of habeas corpus challenges the constitutionality of imposing a sentence of imprisonment until death on a fourteen-year-old child.

2. At sentencing, this Court did not, and could not under Arkansas law, give any consideration to Kuntrell's age or related mitigating circumstances when it imposed a [2] sentence of life imprisonment without the possibility of parole. The line of United States Supreme Court decisions culminating in *Roper v. Simmons*, 543 U.S. 551 (2005), compels a distinct constitutional inquiry before a fourteen-year-old child can be sentenced to die in prison. The failure to conduct such an inquiry requires that Kuntrell Jackson be afforded relief under article II, sections 8 and 9 of the Arkansas Constitution and the Eighth and Fourteenth Amendments to the United States Constitution.

PROCEDURAL HISTORY

3. On April 18, 2001, Kuntrell Jackson was indicted on one count of capital felony murder pursuant to Arkansas Code § 5-10-101, and one count of aggravated robbery pursuant to Arkansas Code § 5-12-103, (Tab 1, Transfer Hearing Record 3-4). These charges were based on an incident that occurred only seventeen days past Kuntrell's fourteenth birthday. Kuntrell and two older children were accused of robbing a local video store. During the robbery, one of the other children with Kuntrell shot and killed the store's clerk.

4. On October 18, 2001, Kuntrell moved to transfer his case to the Juvenile Division of the Circuit Court, or in the alternative, for his case to be

handled under the Extended Juvenile Jurisdiction Act, *see* Ark. Code §§ 9-27-501–10. (Tab 1, Transfer Hearing Record 12-13.) On December 17, 2001, the circuit court held a hearing on this motion. A psychological evaluation of Kuntrell was also submitted in support of the motion. The evaluation revealed that Kuntrell had an IQ of 72 and was unable to engage in abstract [3] reasoning. (Tab 1, Transfer Hearing Record 19-20.) Relying primarily on the seriousness of the offense, the court denied the motion to transfer to juvenile court. (Tab 1, Transfer Hearing Record 76). The judge also denied the defense's motion for extended juvenile jurisdiction, (Tab 1, Transfer Hearing Record 80), but only after expressing his near total lack of knowledge about this new procedure. (Tab 1, Transfer Hearing Record 77: "Now, I don't know on the extended jurisdiction. That is something new to me . . . I frankly don't know, gentlemen.") On January 29, 2003, the Arkansas Supreme Court affirmed in an interlocutory appeal. *Jackson v. State*, No. CA 02-535, 2003 WL 193412 (Ark. 2003).

5. On June 17, 2003, the circuit court held a hearing on the admissibility of Kuntrell's statements to police. Kuntrell made these statements on March 28, 2001 to two detectives and a lieutenant at the Blytheville Police Department. (Tab 2, Trial Record 32, 43-44.) Despite the fact that then 15-year-old Kuntrell was questioned without any parent present and irrespective of the fact that he repeatedly asked for his mother, these statements were deemed admissible. (Tab 2, Trial Record 56-58, 67-68.)

6. On July 18 and 19, 2003, a jury trial was held on the charges against Kuntrell. The State conceded that Kuntrell was not the shooter. (Tab 2, Trial Record 329.) Kuntrell was ultimately convicted of capital murder and aggravated robbery. (Tab 2, Trial Record 357, 360-61.) Without any consideration of his age, his level of involvement in the offense, or his background, the judge imposed a mandatory sentence of life without the possibility of parole. (Tab 2, Trial Record 360; Tab 6, Judgment and Commitment Order.)

[4] 7. On October 7, 2004, the Arkansas Supreme Court affirmed Kuntrell's conviction. *Jackson v. State*, 194 S.W. 2d 757 (Ark. 2004). Kuntrell, still a teenager and without counsel, did not file a motion for post-conviction relief within the 60-day deadline. Ark. R. Crim. P. 37.2(c). Kuntrell's case has never received any post-conviction review.

FACTUAL BACKGROUND

8. The prosecution argued that three young teens, including Kuntrell Jackson, planned a robbery of the Movie Magic video store. During this incident, Laurie Troup, the store's clerk, was shot and killed. The evidence at trial showed Kuntrell did not play a central role in planning or executing the robbery, and made it clear that Kuntrell was not the shooter. (Tab 2, Trial Record 324-26.) Although Kuntrell followed the two other children who committed the robbery, Travis Booker and Derrick Shields, to the store, it

was unclear whether he understood they were serious about committing a robbery. According to Mr. Booker, the prosecution's own witness, Kuntrell initially chose not to enter the store with Mr. Booker and Mr. Shields. (Tab 2, Trial Record 225.) During the robbery, Kuntrell came in to the store and told Mr. Booker and Mr. Shields, "I thought you all were playing." (Tab 2, Trial Record 226.) Mr. Booker testified that Derrick Shields, who brought the gun, shot Ms. Troup when she did not turn over any money. (Tab 2, Trial Record 226, 229, 231.) After the shot was fired, the shocked boys ran home without taking any money. (Tab 2, Trial Record 232, 235-36.)

9. There was no evidence even suggesting that a shooting had been mentioned [5] beforehand. Indeed, the only evidence on this point demonstrates that the boys did not plan to shoot anyone. (Tab 2, Trial Record 235.) Regardless, it was undisputed that Kuntrell did not provide the gun used in the robbery, and, more critically, that he was not the shooter. (Tab 2, Trial Record 324.)

10. Kuntrell's presence during the robbery was due in large part to the impoverished and violent environment in which he grew up. Kuntrell spent his entire life in the small town of Blytheville, Arkansas. When he was young, his family lived in public housing projects on the west side of Blytheville. These projects were characterized by drugs and violence, punctuated by several shootings. The family eventually moved to the east side of Blytheville when Kuntrell was about five years old, but they still faced

persistent crime. To cope, the family moved several times in order to find a safe location.

11. Compounding the dangers of the projects, crises within Kuntrell's home caused constant strife. Kuntrell's biological father abandoned the family before Kuntrell's birth and never played a significant role in Kuntrell's life. Leander Bobo, the longtime boyfriend of Kuntrell's mother, Marie Jackson, and the man Kuntrell considers his father, was an abusive alcoholic and drained the family's resources.

12. Kuntrell was also frequently abandoned by family members who would be sent to prison. First, Kuntrell's mother was sent to prison for shooting and injuring a neighbor when Kuntrell was about six years old, stripping her from the family for a year. Later, when Kuntrell was around thirteen years old, his older brother Douglas was also imprisoned for [6] shooting someone. Not long after this, Mr. Bobo left the family, two of Kuntrell's teenage sisters became pregnant, and several other relatives were incarcerated. Under the weight of such hardship, Kuntrell was more susceptible than other adolescents to the negative influences of his teenage peers.

LEGAL GROUNDS IN SUPPORT OF THE WRIT

I. SENTENCING A FOURTEEN-YEAR-OLD CHILD TO DIE IN PRISON VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

1. Kuntrell Jackson is one of only a few dozen fourteen-year-old children nationwide, including three other children in Arkansas, to be sentenced to life without the possibility of parole. Children aged fourteen and younger are a distinct group of juvenile offenders for whom a death in prison sentence is unconstitutional. Kuntrell's current sentence is unusual, excessive, and in violation of the requirements of the Eighth and Fourteenth Amendments to the United States Constitution, and article II, section 9 of the Arkansas Constitution.

2. The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted . . . ." The Fourteenth Amendment to the United States Constitution states that no State shall "deprive any person of life, liberty, or property, without due process of law." The Eighth Amendment is applicable to the States through the Fourteenth Amendment. *See Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam); *Robinson v. California*, 370 U.S. [7] 660, 666-67 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion). Article II, section 9 of the Arkansas

Constitution similarly provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted, nor witness be unreasonably detained."[1]

A. The principles the Supreme Court reaffirmed in Roper compel the conclusion that sentencing 13- and 14-year old children to die in prison violates the constitutional proscription against cruel and unusual punishment.

3. The United States Supreme Court recently reaffirmed the necessity of referring to "'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion)).

4. In *Roper*, 543 U.S. 551, the Supreme Court declared that the execution of juveniles who were

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[1] Because the Arkansas Constitution uses the disjunctive "cruel *or* unusual," it may provide greater protection than the United States Constitution. *See* Jonathan David Nelson, *Henderson v. Arkansas: One Strike and You're Out – does the Arkansas Constitution Provide its Citizens with More Protection than the United States Constitution in the Context of Cruel And/or Unusual Punishment?*, 56 Ark. L. Rev. 229 (2003). As discussed in this petition, Kuntrell's sentence to die in prison is both cruel and unusual, but he is entitled to habeas relief if this Court finds either.

under the age of eighteen at the time of the crime violates the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 568. In addition to finding that a national consensus had developed against punishing children with death, the Court held that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite [8] insufficient culpability." *Id.* at 572-73. On this basis, the Court concluded:

> When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.

Id. at 573-74. The Court relied upon social science data to conclude that three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569.

5. First, the Court in *Roper* found that juveniles tend to suffer from a lack of maturity and an "underdeveloped sense of responsibility," which often result in "impetuous and ill-considered actions and decisions." *Id.* at 569 (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). Thus, "adolescents are overrepresented . . . in virtually every category of reckless behavior." *Id.* A fourteen-year-old's lack of responsibility and immaturity is consonant with recent research

indicating that the human brain continues to develop into an individual's early twenties.[2]

6. Second, young children "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* at 569. This stems from the fact that they "have less control . . . over their own environment [and therefore] . . . lack the freedom that adults have to extricate themselves from a criminogenic setting." *Id.* (internal [9] quotation and citation omitted). As the Supreme Court recognized in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Id.* at 115.

7. Finally, the Court relied upon the fact that the character of a child is not as well formed as that of an adult. "The personality traits of juveniles are more transitory, less fixed." *Roper*, 543 U.S. at 570. As a consequence of these limitations, the Court in *Roper* concluded that, it would be "misguided to equate the failings of a minor with those of an adult, for a greater

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[2] *See* Brown, SA., Taper, SF., Gransholm, E., & Delis. DC., *Neurocognitive Functioning of Adolescents: Effects of Protracted Alcohol Abuse*, Alcohol. Clin. Exp. Res. 2000 Feb; 24(2), 164-71; *see also* Shannon Brownlee, *Inside the Teen Brain*, U.S. News and World Report (Aug. 9, 1999) (stating that "one of the last parts [of the teenage brain] to mature is in charge of making sound judgments and calming unruly emotions.").

possibility exists that a minor's character deficiencies will be reformed." *Id.*

8. The Supreme Court's decision in *Roper* is a recognition that sentencing standards regarding juveniles have evolved such that a sentence of life without parole for a defendant like Kuntrell, who was fourteen years old at the time of the offense, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

9. The record demonstrates that Kuntrell exhibited the characteristics which the *Roper* Court associated with reduced culpability: he engaged in reckless and irresponsible behavior and demonstrated a lack of control over and a susceptibility to negative influences in his environment. Even Judge David Burnett, who denied Kuntrell's motion to transfer to juvenile court, acknowledged that Kuntrell only possessed "borderline to near borderline capacity" for a child his age. (Tab 1, Transfer Hearing Record 77.) Judge Burnett reached this conclusion after considering a psychiatric evaluation revealing that Kuntrell functioned [10] only at the 4th percentile. (Tab 1, Transfer Hearing Record 76-77.) Thus, the evidence shows that Kuntrell was precisely the sort of child about whom the *Roper* Court was concerned.

10. The State of Arkansas has also recognized that fourteen-year-olds have limited decision-making capabilities distinct from older teens. Accordingly, unlike older juveniles, they are prohibited from driving, Ark. Stat. Ann. § 27-16-604; prevented from

getting married without a court order, Ark. Stat. Ann. §§ 9-11-102(a) (minimum age restrictions) – 103 (court order provisions); required to attend school, Ark. Stat. Ann § 6-18-201; and allowed to work on certain jobs only under certain restrictions, *see* Ark. Stat. Ann. §§ 11-6-105–110.

11. The analysis of the United States Supreme Courts in *Roper* has the greatest force and application to the youngest offenders, which makes the constitutional framework for sentencing juveniles most compelling in this case. Kuntrell was sentenced to life without parole when he was fourteen years old and received the harshest sentence possible under Arkansas law, outside of a death sentence. Despite the severity of this sentence, there was no consideration of his age or the constitutionally significant factors relevant to juvenile sentencing highlighted by *Roper.*

[11] **B. <u>There exists a broad and longstanding consensus that young adolescents are not sufficiently mature to warrant receiving a sentence of death in prison.</u>**

12. A growing number of psychosocial studies of adolescents support the idea that young adolescents, in particular, have deficient decision-making capabilities. An extensive study of adolescent decision-making capabilities, which focused specifically on legal-competence related issues, concluded that "juveniles aged 15 and younger are significantly more

likely than older adolescents and young adults to be impaired in ways that compromise their ability to serve as competent defendants." Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333, 356 (August 2003). Other research confirms that young teenagers are immature in their decision-making capabilities, particularly in the areas of responsibility, perspective, and impulse-control. *See* Elizabeth Cauffman and Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults,* 18 Behav. Sci. & Law 18, 741, 756 (2000) ("the steepest inflection point in the [psychosocial maturity] developmental curve occurs sometime between 16 and 19 years . . . the period between 16 and 19 marks an important transition point in psychosocial development."); *see also* Bonnie L. Halpern-Felsher and Elizabeth Cauffman, *Costs and benefits of a decision: Decision-making competence in adolescents and adults*, 22 J. Applied Developmental Psychol. 257 (2001) (noting important difference exist in the decision-making competence of early adolescents and older teenagers.) These are the types of impairments identified by the Supreme Court as relevant to the question of adolescent [12] culpability. *Roper v. Simmons,* 543 U.S. 551, 569 ("[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.") (citations omitted).

13. In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the Supreme Court acknowledged that children under sixteen are less culpable for their actions than adults. *Id.* at 833-35. The Court noted that "adolescents, *particularly in the early and middle teen years*, are more vulnerable, more impulsive and less self-disciplined than adults." *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)) (emphasis added). The Court found that teenagers lack the experience, perspective, and judgment of adults and therefore are "less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure." *Id.* at 835.[3]

14. Furthermore, the Supreme Court recognized that "youth crime is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* at 834 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 n.11 (1982)). For these reasons, the Court found that seeking retribution against a fifteen-year-old child is inconsistent with respect for human dignity. *Id.* at 836-37.

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[3] "Adolescence is well recognized as a time of great physiological and psychological stress," but adolescents who kill often have to cope with even greater stress due to "brain dysfunction, cognitive limitations, and severe pyschopathology" and "must function in families that are not merely nonsupportive but also violent and brutally abusive." *Id.* at 835 n.42.

[13] 15. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Supreme Court distinguished younger adolescents from those sixteen and older, permitting sixteen- and seventeen-year-olds to be subjected to harsher punishments, including death. *Id.* at 380. Although the holding of *Stanford* was overruled by *Roper*, there is no indication that the Supreme Court intended to abandon the constitutionally significant sentencing distinction between young adolescents and older teenagers. The significant distinctions between those fourteen and younger and older juveniles requires a distinct constitutionally inquiry into the propriety of sentencing a fourteen-year-old to die in prison.

16. The longstanding acknowledgment that young adolescents have more limited culpability than older teens has resulted in very few sentences of life without parole for children Kuntrell's age. Only 3.3 percent of all juveniles sentenced to die in prison were fourteen or younger at the time of the offense. *See* Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year Old Children to Die in Prison* 5 (2007), *available at* http://eji.org/eji/files/20071017cruelandunusual.pdf (finding 2,225 people serving death in prison sentences for crimes committed under the age of 18); *id.* at 12 (identifying 73 cases where children were sentenced to life without possibility of parole for crimes committed at ages 13 or 14); *see also* Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 26 (2005), *available*

at http://www.amnestyusa.org/countries/usa/clwop/report.pdf (estimating 2.7 percent of all juveniles sentenced to die in prison were under fourteen at the time of the offense).

[14] **C. The infrequency with which children under fourteen are sentenced to life without even the possibility of parole demonstrates that such a sentence is cruel and unusual because it offends our nation's evolving standards of decency.**

17. The practice of sentencing fourteen-year-olds to death in prison is so infrequent as to render it an arbitrary and "unusual" punishment prohibited by the Eighth Amendment. Kuntrell is only the fourth fourteen-year-old child known to be sentenced to life imprisonment without parole in the State of Arkansas.[4] Extensive research by undersigned counsel has uncovered children fourteen years old or younger sentenced to life without parole in only eighteen other states.[5] In the great majority of states, therefore, no

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[4] Neither Arkansas's Department of Corrections nor undersigned counsel's extensive research, *see* note 5, *infra*, could identify more than four children Kuntrell's age who have been sentenced to life imprisonment without parole in Arkansas. *See also* Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14- Year Old Children to Die in Prison* 20 (2007), *available at* http://eji.org/eji/files/20071017cruelandunusual.pdf.

[5] Alabama, Arizona, California, Colorado, Delaware, Florida, Illinois, Iowa, Michigan, Mississippi, Missouri, Nebraska,

(Continued on following page)

child Kuntrell's age has been subjected to life imprisonment without possibility of parole.

18. The nationwide and statewide statistics show that young children are almost never sentenced to die in prison because such a sentence offends our evolving standards of decency. Undersigned counsel has identified no more than a few dozen cases nationwide in which a sentence of life imprisonment without parole has been imposed on someone as young as fourteen. Equal Justice Initiative, *supra,* at 12.

[15] 19. Cases in which children fourteen or younger have been sentenced to life imprisonment without parole represent just a tiny fraction of cases in which children that age have been arrested for homicide. Equal Justice Initiative, *supra*, at 12. In Arkansas, 153 juveniles were arrested for murder or non-negligent homicide between 1995 and 2004.[6] However, only two fourteen-year-olds, about one

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North Carolina, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin. Undersigned counsel extensively consulted with state departments of corrections, exhaustively reviewed published decisions and news articles available in electronic databases, and consulted with juvenile justice scholars and practitioners. *See* Equal Justice Initiative, note 4, *supra*, at 11.

[6] *See* U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States 338 (2004), *available at* http://www.fbi.gov/ucr/ucr.htm; *id.* at 328 (2003); *id.* at 292 (2002); *id.* at 292 (2001); *id.* at 274 (2000); *id.* at 270 (1999); *id.* at 268 (1998); *id.* at 280 (1997); *id.* at 272 (1996); *id.* at 266 (1995).

percent of all arrested, including Kuntrell Jackson,[7] have been sentenced to life imprisonment without parole for crimes committed during that time period.[8]

20. In interpreting the Eighth Amendment's prohibition against cruel and unusual punishments, courts must refer to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual. *Roper*, 543 U.S. at 560-61 (citing *Trop*, 356 U.S. at 100-01 (plurality opinion)). "Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is 'unusual', in common usage, depends upon the frequency of its occurrence or the magnitude of its acceptance." *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988).

[16] 21. It is well-established that courts should look to the frequency with which a punishment is imposed in determining whether it is unusual for Eighth Amendment purposes. In *Furman*, 408 U.S. 238, the Court struck down Georgia's statute "under which the death penalty was 'infrequently imposed' upon 'a capriciously selected random handful.'" *Godfrey v. Georgia*, 446 U.S. 420, 438 (1980) (Marshall, J., concurring) (citing *Furman*, 408 U.S. at 309-10

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[7] Derrick Shields, one of Kuntrell' s co-defendants, was the only other fourteen-year old arrested for homicide and sentenced to life without parole during this ten-year period.

[8] The other two fourteen-year-olds' arrests predate 1995.

(Stewart, J., concurring)); *see also id.* at 439 n.9 (noting that, in *Furman*, Justices Stewart and White "concurred in the judgment largely on the ground that the death penalty had been so infrequently imposed that it made no contribution to the goals of punishment.").[9]

22. In *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977), the Court looked to the rarity of death sentences for rape of adult women in concluding that the death penalty is an unconstitutionally cruel and unusual punishment for that crime. Likewise, in *Thompson*, 487 U.S. 815, a plurality of the Court determined that contemporary standards of decency did not permit the execution of offenders under the age of sixteen at the time of the crime, noting that the death penalty was imposed on offenders under sixteen with exceeding rarity. *Id.* at 832-33.

23. When *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided, only a minority [17] of states

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[9] *See also Furman*, 408 U.S. at 249 (rarity of a sentence leads to inference of its arbitrary imposition) (Douglas, J., concurring); *id.* at 274-77 (Eighth Amendment prevents arbitrary death sentences; rarity of death sentences results in inference of arbitrariness) (Brennan, J., concurring); *id.* at 299-300 (Brennan, J., concurring); *id.* at 312 (rarity of imposition indicates arbitrariness; "A penalty with such negligible returns to the State would be patently excessive" and therefore violate Eighth Amendment) (White, J., concurring); *id.* at 314 (White, J., concurring); *see also Enmund v. Florida*, 458 U.S. 782, 794-96 (1982) (few juries sentence defendants to death who neither killed nor intended to kill).

permitted the execution of persons with mental retardation, "and even in those States it was rare. On the basis of these indicia the Court determined that executing mentally retarded offenders 'has become truly unusual, and it is fair to say that a national consensus has developed against it.'" *Roper*, 543 U.S. at 563 (citations omitted); *see also id.* at 564 ("*Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. Since *Penry[v. Lynaugh*, 492 U.S. 302 (1989)], only five States had executed offenders known to have an IQ under 70.").

24. The Court in *Roper* found "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal'" so as to render the juvenile death penalty unconstitutionally cruel and unusual based in part on the infrequency of its use even in states where it remained on the books. *Id.* at 568; *see also id.* at 564 (noting that even in twenty states without formal prohibition on executing juveniles, "the practice is infrequent.").

25. The fact that in the great majority of states no children fourteen or younger have been sentenced to life without parole, together with the small number of children serving such sentences even in states that have imposed it, demonstrates that such a sentence is so unusual as to be prohibited by the Eighth Amendment.

26. In determining that death is a disproportionate sentence for juvenile offenders, the *Roper* Court also reaffirmed its practice of referring to "the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's [18] prohibition of 'cruel and unusual punishments.'" 543 U.S. at 575. The Court specifically referred to the Convention on the Rights of the Child's prohibition against imposing the death penalty on juveniles and noted that "[p]arallel prohibitions are contained in other significant international covenants." *Id.* at 576.

27. International law prohibits sentencing children to death in prison. The United States is one of only a few countries that permit fourteen-year-olds to be sentenced to life in prison without the possibility of parole. The Convention on the Rights of the Child, ratified by every country in the world except the United States and Somalia; the United Nations Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448, 1468-70 (entered into force Sept. 2, 1990); and at least 132 countries have rejected the sentence altogether, *see* Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, at 5 (2005), http://www.amnestyusa.org/countries/usa/clwop/report.pdf.

28. The rarity with which life imprisonment without parole is imposed on fourteen-year-old children reflects community norms and values that have evolved to reject life without parole sentences for

young children Kuntrell's age. Accordingly, Kuntrell's sentence violates the Eighth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Arkansas Constitution.

29. Because Kuntrell's age makes him ineligible for a sentence of life without parole, he is actually innocent of that sentence. *See Sawyer v. Whitley*, 505 U.S. 333, 345 [19] (1992) (recognizing that a person is actually innocent of the death penalty where a condition for eligibility is not met).

II. THE MANDATORY NATURE OF THE SENTENCE IN THIS CASE VIOLATED KUNTRELL'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

30. The sentencing court could not consider Kuntrell's age, role in the offense, mental capacity, or personal background when sentencing him to imprisonment until death. Instead, the court applied a mandatory sentence that unconstitutionally failed to consider and weigh compelling mitigating evidence. This violated the Eighth and Fourteenth Amendments of the United States Constitution, and article II, section 8 of the Arkansas Constitution.

31. The Arkansas Legislature has not passed a statute expressly providing that fourteen-year-olds convicted of capital murder should be subjected to a mandatory sentence of life without possibility of parole. This violates the Due Process Clause of the Fourteenth Amendment and article II, section 8 of the

Arkansas Constitution, because it is not the result of a legislative determination that life without parole should be the only available punishment in such cases. It also violates due process because a mandatory life without parole sentence requires the sentencing judge to impose the penultimate penalty without considering or giving effect to mitigating circumstances. The Legislature has made no determination to remove sentencing discretion from the judge in capital murder cases involving fourteen-year-old offenders, nor does the Constitution permit the mandatory sentencing of fourteen-year-[20]old offenders to death in prison.

32. The United States Supreme Court has long held that the ultimate punishment – the death penalty – cannot be mandatory, because the Eighth and Fourteenth Amendments require the sentencer to consider all mitigating factors related to the offender and the crime which suggest that the harshest sentence is not appropriate. *See Summer v. Shuman*, 483 U.S. 66 (1987) (holding categorically that mandatory death sentences are unconstitutional); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (holding Louisiana statute providing for mandatory sentence of death for crime of first-degree murder of police officer violated the Eighth and Fourteenth Amendments); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of

inflicting the penalty of death."); *see also Hitchcock v. Dugger*, 481 U.S. 393, 394 (1987) (unanimously holding that the "sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence."); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (expressly stating that the sentencer must be given *all* mitigating evidence, defined as any evidence that "might serve 'as a basis for a sentence less than death.'"); *Eddings*, 455 U.S. 104 (striking state statute that precluded sentencer from considering certain relevant mitigating evidence, in support of mitigating factors); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that "the Eighth and Fourteenth Amendments require that the sentencer [21] . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *Bowe v. The Queen*, [2006] UKPC 10 (appeal taken from The Bahamas) (striking down mandatory death sentence).

33. Imposing a life without parole sentence on a fourteen-year-old child without permitting the sentencing court to consider whether or not the penultimate sentence is proportionate to the crime and the child likewise offends the Eighth and Fourteenth Amendments and article II, section 9 of the Arkansas Constitution. First, life without parole is a different and harsher punishment when inflicted on a fourteen-year-old, which renders the sentence presumptively disproportionate and requires individualized consideration to justify its imposition. As noted by the

Kentucky Supreme Court, "life without parole for a juvenile, like death, is a sentence different in quality and character from a sentence to a term of years subject to parole." *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984); *see also Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968) (reversing life without parole sentences for two fourteen-year-olds convicted of forcible rape).

34. In striking down on proportionality grounds a life without parole sentence imposed on a thirteen-year-old, the Nevada Supreme Court characterized life without parole as a "denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the defendant], he will remain in prison for the rest of his days." *Naovarath v. Nevada*, 779 P.2d [22] 944, 948-49 (Nev. 1989). In addition, young offenders run a far greater risk of physical and sexual assault by older, more mature prisoners, and will suffer this fate for years to come when sentenced to life without parole.

35. More critically, *Roper* created a different class of defendants when it prescribed that juveniles are constitutionally entitled to different consideration based on their distinct competency, culpability, and capacity for rehabilitation: "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Roper*, 543 U.S. at 572-73; *see also Naovarath*, 779 P.2d at 946-47 ("When a child reaches twelve or

thirteen. it may not be universally agreed that a life sentence without parole should never be imposed. but surely all agree that such a severe and hopeless sentence should be imposed on prepubescent children, if at all, only in the most exceptional of circumstances. Children are and should be judged by different standards from those imposed upon mature adults.").

36. Individualized consideration at sentencing in a capital murder case involving a fourteen-year-old defendant is constitutionally required because a fourteen-year-old's immaturity, vulnerability, and lack of neurological and personality development undermine the reliability of the criminal process at each stage. Consequently, before the harshest punishment is imposed, a sentencer must be permitted to consider and give effect to mitigating evidence.

37. In Kuntrell's case, this Court had no discretion to consider whether life [23] imprisonment without parole is proportionate in light of the wealth of mitigating evidence in this case, including Kuntrell's young age.

A. <u>The court could not consider Kuntrell's age at the time of the offense.</u>

38. Kuntrell was a mere seventeen days beyond his fourteenth birthday at the time of the offense, a fact which is unquestionably mitigating, *Roper*, 543 U.S. 551; *Thompson v. Oklahoma*, 487 U.S. 815 (1988). As the Supreme Court reasoned in *Roper*, "'[a] lack of maturity and an underdeveloped sense of

responsibility are found in youth more often than in adults and are more understandable among the young.'" 543 U.S. at 569 (quoting *Johnson*, 509 U.S. at 367).

B. The court could not consider Kuntrell's minimal role in the offense.

39. There is no dispute that Kuntrell did not handle the gun or fire the fatal shot. Indeed, the state repeatedly conceded this point during the trial. (Tab 2, Trial Record 324: "You heard Kuntrell's statement and you heard Travis, and they both state, yeah . . . Derrick shot her. So that's undisputed;"; Tab 2, Trial Record 329: "I'm not saying Kuntrell had the gun . . . Nobody's saying [Kuntrell] committed the homicidal act. We're not saying he had the gun and shot her.")

C. The court could not consider Kuntrell's limited mental capacity.

40. The court could not consider that Kuntrell's IQ of 72 and his inability to engage in abstract reasoning placed his mental functioning at the 4th percentile compared to children his age. (Tab 1, Transfer Hearing Record 19, 76.) Kuntrell's mental development [24] was thus behind 96% of his same-aged peers. (Tab 1, Transfer Hearing Record 76.) At the conclusion of the hearing on Kuntrell's motion to transfer to juvenile court, Judge David Burnett described Kuntrell's capacity as "borderline or near borderline." (Tab 1, Transfer Hearing Record 77.)

D. <u>The court could not consider that Kuntrell's childhood was shaped by the impoverished and violent environment in which he lived.</u>

41. The court could not consider the poverty and violence that misshaped Kuntrell's childhood. Kuntrell's traumatic experience undoubtedly distorted his decision-making capacity and his ability to gauge the seriousness of his actions. This circumstance is clearly mitigating evidence. *See Penry*, 492 U.S. at 328 (jury must be permitted to consider defendant's background in order to give "reasoned moral response" in sentencing).

42. During Kuntrell's early years, his family lived in the public housing projects on the west side of Blytheville, Arkansas. (Tab 4, Douglas Affidavit 3.) The family struggled financially and was on welfare. While living in the housing projects, Kuntrell was exposed to crime and violence. Drug dealing, theft, and fighting were all commonplace. (Tab 4, Douglas Affidavit 3.) Shootings occurred on a number of occasions. (Tab 4, Douglas Affidavit 3.)

43. Around the time Kuntrell was five years old, his family moved to a home on the east side of Blytheville. (Tab 3, Douglas Affidavit.) Though the neighborhood was somewhat better than their previous one, life on the east side was still difficult. There were frequent fights in the neighborhood, and drug dealing persisted. (Tab 4, Douglas Affidavit [25] 7.) At the corner of the street on which the family first

moved, there was a bar where drug addicts and prostitutes congregated regularly. (Tab 4, Douglas Affidavit 7.)

44. In 1991, just three months after the family moved to the east side, Kuntrell's mother, Marie Jackson, was incarcerated for shooting and injuring a neighbor during an altercation. (Tab 4, Douglas Affidavit 6.) Kuntrell's entire family was devastated by Marie's imprisonment. In her absence, the family had no option but to split up and move. Kuntrell and Douglas Jackson, Kuntrell's older brother, initially stayed with Leander Bobo, Ms. Jackson's longtime boyfriend. (Tab 4, Douglas Affidavit 6.) Kuntrell's sisters, Surelonda, Porchala, and Lequetcha, went to live with Marie's sister Shelby Smith. (Tab 4, Douglas Affidavit 6.) About five months later, however, Mr. Bobo was fired from his job, so Kuntrell and Douglas moved in with their sisters and Ms. Smith. (Tab 4, Douglas Affidavit 6.)

45. Upon Ms. Jackson's return from prison in 1992, the family moved back into a home on the east side of Blytheville. (Tab 4, Douglas Affidavit 7.) Financial troubles soon followed. On several occasions, the family had its water turned off, as well as its power. (Tab 4, Douglas Affidavit 5.) To complicate matters, crime still plagued their neighborhood, which forced the family to move on at least three separate occasions. (Tab 4, Douglas Affidavit 7.) All of theses moves were to locations on the east side of town, however, making it difficult for the family to

escape their problems in this small community of Blytheville. (Tab 4, Douglas Affidavit 7.)

46. Dysfunction in the relationships between Kuntrell's family members also [26] played a deleterious role in Kuntrell's childhood and adolescence. Kuntrell's mother and his biological father, James Peoples, were never married, and Mr. Peoples was seldom present during Kuntrell's childhood. (Tab 4, Douglas Affidavit 4; Tab 5, Porchala Affidavit 5.) From the time Kuntrell was six-months old, Leander Bobo acted as his father figure. (Tab 4, Douglas Affidavit 5; Tab 5, Porchala Affidavit 6.) Unfortunately, Mr. Bobo had a severe drinking problem, which lead Mr. Bobo to waste the family's already meager income on alcohol and gambling. (Tab 4, Douglas Affidavit 5.) Mr. Bobo and Kuntrell's mother had many arguments over Mr. Bobo's drinking. Some of Mr. Bobo and Ms. Jackson's arguments left Ms. Jackson with visible bruising. (Tab 4, Douglas Affidavit 5.)

47. Other aspects of Kuntrell's home life undermined his ability to make sound judgments. Arguments frequently occurred among Kuntrell's mother and his sisters. (Tab 4, Douglas Affidavit 11.) These arguments were extremely disruptive, and often led to Kuntrell's siblings moving out of the house for brief periods of time. (Tab 4, Douglas Affidavit 11.) In addition, guns were an accepted part of life in Kuntrell's family. Kuntrell's mother, Leander Bobo, and his brother Douglas all kept at least one gun, as did various cousins who lived in Blytheville

and associated with the family. (Tab 4, Douglas Affidavit 9.) Indeed, Kuntrell's grandmother used her gun to shoot and injure her own son – another of Kuntrell's uncles – during an argument. (Tab 4, Douglas Affidavit 9.) This event, which occurred while Kuntrell's family was living in the west side housing projects, is now considered something of a family legend (Tab 4, Douglas Affidavit 9).

[27] 48. When Kuntrell was around eleven years old, the family began to experience a number of additional crises. First, Kuntrell's older brother Douglas was sent to prison for a robbery in which Douglas fired a gun at someone. (Tab 4, Douglas Affidavit 12; Tab 5, Porchala Affidavit 4.) Kuntrell was very close to his brother and was deeply upset by his incarceration. (Tab 5, Porchala Affidavit 4.) Shortly after Douglas was sent to prison, Kuntrell's mother and Mr. Bobo ended their turbulent relationship. (Tab 5, Porchala Affidavit 6; Tab 4, Douglas Affidavit 12.) This also took a harsh toll on Kuntrell, as Mr. Bobo was the only father figure Kuntrell had ever known. Exacerbating these tensions, around this same time Kuntrell's older sisters Lequetcha and Porchala became pregnant when they were just thirteen and sixteen years old, respectively. (Tab 5, Porchala Affidavit 3.) In addition, a cousin of Kuntrell with whom the family was close was convicted of burglary and murder, for which he received a sentence of life without parole. (Tab 4, Douglas Affidavit 13.) Each of these crises, coming in such close succession, crippled

Kuntrell's adolescent coping skills and decision-making ability.

49. As a result of this disharmony, Kuntrell began spending less time with his family and more time on the streets without any adult supervision. This lack of guidance fully exposed Kuntrell to the negative elements of his neighborhood. Tragically, much of Kuntrell's time was spent back in the projects on the west side of Blytheville. (Tab 5, Porchala Affidavit 7.) These projects had by this time obtained one of the worst reputations for crime of any area in Blytheville. (Tab 5, Porchala Affidavit 8.) In fact, a number of the [28] cousins and friends with whom Kuntrell associated were incarcerated at one point or another for various crimes. (Tab 5, Porchala Affidavit 7.)

50. The effects of all these stressors can be readily observed in Kuntrell's school performance. Through the third grade, Kuntrell regularly carried a "B" average. (Tab 3, Permanent School Records.) In the fourth grade, between the ages of nine and ten, Kuntrell essentially stopped attending school. His grades began to decline markedly as a result. By the time of his offense just over two years later, Kuntrell had failed the seventh grade. (Tab 3, Permanent School Records.)

51. Because the character of a child is not as well formed as that of an adult, the Court in *Roper* concluded that it would be "misguided to equate the failings of a minor with those of an adult, for a greater

possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570. Moreover, research has shown that juveniles subjected to trauma and neglect suffer from cognitive underdevelopment, immaturity, lack of responsibility, impulsiveness, and susceptibility to outside influences greater even than those suffered by normal teenagers. Nancy Kaser-Boyd, Ph.D., *Post-Traumatic Stress Disorders in Children and Adults: The Legal Relevance, Desktop Reference Manual* (May 1994).

52. In Kuntrell's case, the tumult and chaos that defined his environment, both in Blytheville and within his own family, surely had grave consequences for his development. However, the sentencing court was prevented from even acknowledging these factors because Arkansas unconstitutionally prevents judges from making individualized [29] determinations as to whether a sentence of life without parole is appropriate for a fourteen-year old convicted of capital murder.

III. A HABEAS PETITION IS THE APPROPRIATE VEHICLE FOR THIS CLAIM

53. Under Arkansas law, a petitioner is entitled to a writ of habeas corpus if he or she can demonstrate, "by affidavit or other evidence, probable cause to believe he or she is detained without lawful authority. . . ." Ark.Code Ann § 16-112-103; *see also Ford v. Norris*, ___ Ark. ___, 2007 WL 701042 at *1 (Ark. March 8, 2007). The writ shall issue "when a judgment of conviction is invalid on its face or when a

circuit court lacked jurisdiction over the cause." *Rickenbacker v. Norris*, 206 S.W.3d 220, 291 (Ark. 2005).

54. Arkansas courts consider a petitioner's allegation that his or her sentence is void or illegal as tantamount to an issue of subject matter jurisdiction. *Flowers v. Norris*, 68 S.W.3d 289 (Ark. 2002). A court will therefore review such allegations regardless of whether the petitioner raised them with the trial court or in a postconviction petition. *Id.* (petitioner may seek habeas on claim not presented to trial court); *Waddle v. Sargent*, 885 S.W.2d 919, 922 (Ark. 1993) (petitioner may bring habeas after post-conviction petition). Indeed, Arkansas places no time limitations on a properly presented habeas application, as this would constitute an impermissible suspension of the writ. *Renshaw v. Norris* 998 S.W.2d 515, 518 (Ark. 1999).

55. Kuntrell is being held without lawful authority because it is unconstitutional to sentence a fourteen-year-old to die in prison. A claim that a prisoner's sentence is illegal under the federal constitution is cognizable in state habeas. *See Kelly* [30] *v. Norris*, 2005 WL 984777 at *2 (Ark. April 28, 2005) (per curiam) (deciding prisoner's double jeopardy claim strictly on federal constitutional grounds).

PRAYER FOR RELIEF

Kuntrell's sentence in this case violates his right to be free from cruel and unusual punishment protected by the Eighth and Fourteenth Amendments to the United States Constitution and article II, section 9 of the Arkansas Constitution; his right to due process protected by the Fourteenth Amendment to the United States Constitution and article II, section 8 of the Arkansas Constitution; as well as international law.

For all the above stated reasons and other such reasons as may be made upon amendment of this petition, Kuntrell Jackson respectfully asks this Honorable Court to grant him the following relief:

(A) Afford petitioner an opportunity to reply to any responsive pleading filed by respondent;

(B) Permit petitioner an opportunity to brief and argue the issues presented in this petition;

(C) Issue a writ of habeas corpus granting Kuntrell Jackson relief from his unconstitutional sentence;

(D) If the Court thinks further factual development is necessary, grant an evidentiary hearing;

(E) Grant such further and other relief as may be appropriate.

[31] Respectfully submitted this 8th day of January, 2008.

/s/ Brandon J. Buskey
BRYAN A. STEVENSON
BRANDON J. BUSKEY
ALICIA A. D'ADDARIO
Equal Justice Initiative
of Alabama
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

[Certificate Of Service Omitted In Printing]

No. CV-08-28-2

**IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT-WEST
JEFFERSON COUNTY**

KUNTRELL JACKSON, Petitioner,

v.

LARRY NORRIS, in his capacity as
DIRECTOR OF THE ARKANSAS DEPARTMENT
OF CORRECTIONS, Respondent.

APPENDIX

BRYAN A. STEVENSON
BRANDON J. BUSKEY
ALICIA A. D'ADDARIO
Equal Justice Initiative of Alabama
122 Commerce Street
Montgomery, AL 36104
(334) 269-1803

Counsel for Kuntrell Jackson

* * *

IN THE CIRCUIT COURT FOR THE CHICKASAWBA DISTRICT OF MISSISSIPPI COUNTY, ARKANSAS CRIMINAL DIVISION

BOOK 31 **PAGE** 648-651

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR-2001-106(B)
AT #633083

KUNTRELL OBRYAN JACKSON DEFENDANT

FELONY INFORMATION

(Filed Apr. 18, 2001)

Brent Davis, Prosecuting Attorney of the Second Judicial District of the State of Arkansas, in the name and by the authority of the State of Arkansas charges *KUNTRELL OBRYAN JACKSON*, with the crimes of *CAPITAL MURDER; ARK. CODE ANN. SEC. 5-10-101; Class "Y" Felony; AGGRAVATED ROBBERY; ARK. CODE ANN. SEC. 5-12-103; Class "Y" Felony;* committed as follows to wit:

COUNT I

That said Defendant did on or about the 18th day of November, 1999, within the Chickasawba District of Mississippi County, did, unlawfully and feloniously, acting alone or with one or more persons, did commit the crime of aggravated robbery, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice did cause the death of Laurie Troup, under circumstances manifesting extreme indifference to the value of human life, against the peace and dignity of the State of Arkansas.

COUNT II

That said Defendant did on or about the 18th day of November, 1999, within the Chickasawba District of Mississippi County, did, unlawfully and feloniously, with the purpose of committing a theft or resisting apprehension immediately thereafter did employ physical force upon another, and was armed with a deadly weapon, did inflict death on another person, namely Laurie Troup, with the purpose of committing a robbery, against the peace and dignity of the State of Arkansas.

The State further alleges that the said Defendant is subject to an enhanced punishment pursuant to Arkansas Code Annotated Section 16-90-121, for committing a felony offense involving the use of a deadly weapon.

BRENT DAVIS, PROSECUTING ATTORNEY

BY /s/ Bruce Harlan
Deputy Prosecuting Attorney
Chickasawba District
Mississippi County, Arkansas
P. O. Box 627
Blytheville, AR 72316-0627

Subscribed and sworn to before me this 18 day of April, 2001.

DONNA DICICCO
CIRCUIT CLERK

BY /s/ Mary Frieddell D.C.
Deputy Circuit Clerk
[SEAL]

[IN THE CIRCUIT COURT OF
MISSISSIPPI COUNTY, ARKANSAS
CHICKASAWBA DISTRICT

STATE OF ARKANSAS PLAINTIFF

VS. NO. CR-01-106

KUNTRELL JACKSON DEFENDANT

REPORT OF PROCEEDINGS

BE IT REMEMBERED AND CERTIFIED that on the 17th, 18th, and 19th of June, 2003, the following jury trial on the charge of capital murder was held in Blytheville, Arkansas, before the Honorable David Burnett, Circuit Judge.]

[Direct Examination of Travis Booker by Deputy Prosecuting Attorney Curtis Walker]

* * *

[202] A It came up at the time, I guess.

Q It came up at the time? Okay. You don't remember how it came up at the time?

A Just walkin' and talkin'.

Q Okay. Where were you guys walking? Where you coming from?

A The projects.

Q The projects? Which projects? You talking about –

A Chickasaw Courts.

Q Okay. And who goes into Movie Magic?

A Well, first we was all gonna go in but then Kuntrell, you know –

MR. ELLIS: Your Honor, could you have him repeat that? I can't hear him over here.

THE COURT: Yeah, sure, move.

BY THE WITNESS:

A When we got there, you know, Kuntrell said he ain't wantin' to go in, so he stood outside, you know, and told him to wait –

Q Okay. So he stood outside.

A – to wait out there. He waited out there, and me and Derrick went in.

Q Okay. You and Derrick, are you saying the only ones that went in?

A We went in, and Derrick pulled the gun out and said something to her. You know, Kuntrell walked in. When Kuntrell walked in, Derrick said something else, and then the shotgun [203] went off.

Q Now, what did Kuntrell say?

A At the time, I thought he said, uh, "We ain't playin'" is what he said, but "I thought you all was playin'," is what he told me he said.

Q Say it again.

A "I thought you all were playin'."

Q Wait. You said, at first you thought he said, we?

A At, first – my first reaction, I thought he was saying to her that, "We ain't playin'." But, you know, when we talked about it, he told me he said, "I thought you all was playin'."

Q Oh, so now you're saying – how did you come up with that?

A That's what he told me, you know.

Q Oh, that's what he told you?

A It was – yeah.

Q Oh, okay. Now, in Movie Magic though, Kuntrell does come in?

A Yeah.

Q Now, who had the gun?

A Derrick Shields.

Q Okay. And you saw the gun before you went in there, right?

A Yes, sir.

Q Did Kuntrell see the gun before going in?

A Yes, sir.

Q Okay. And so you all saw the gun? What was the gun like?

* * *

[206] A Well, we was – we was just walkin' and talkin', and it just came up.

Q Okay. Came up. Okay. And – and you don't remember who came up with the plan?

A I don't remember who the first person to bring it up.

Q But before going in Movie Magic, everybody sees the gun?

A Yeah, while we was in the projects.

Q Okay. Now, you said the gun was a sawed-off shotgun, right?

A Yes, sir.

Q Now, when you got at the Movie Magic and you go in, you said at first it was you and Derrick?

A Yes, sir.

Q And you said Derrick had the gun?

A Yes, sir.

Q Okay. Now, at that point, when did Kuntrell walk in?

A Derrick pulled the gun, and he said something to her, you know, when we was in there. She says something back to him, then that's when Kuntrell walked in.

Q Okay. Now, where is Kuntrell when he said what he said? What does Kuntrell say?

A Kuntrell came to the door, and said, "I thought you all was, playin'."

Q Well, now, did you at one point say that Kuntrell said –

MR. ELLIS: Your Honor, I'm gonna object to this.

* * *

[208] A Yeah. I was thinking – the look on his face – his facial expressions and everything, that's what he probably said most likely.

Q Okay. Now, after – what happened – how did the shot go off?

A It – Derrick said something else to her. She still didn't do nothing, and the shot just went off, and we all just ran.

Q You all just ran?

A Yeah.

Q Okay. Now, when the shot goes off, where is Kuntrell at?

A He walked into the store. He was on the side of the counter.

Q Okay. Now, when he made his statement, where is he when he made this statement inside Movie Magic?

A A little bit in front of the counter.

Q A little bit in front of the counter?

A Yes, sir.

Q Okay. And, at that point, he's a little bit in front of the counter. Derrick points the gun at her, and you're – where are you at?

A I'm on the side of Derrick.

Q On the side of Derrick, okay. Now, once the shot goes off – now, go on, what was said? What was said?

A Derrick said, "Drop it off."

And she said, "I ain't got no money." You know, she says [209] something about calling the police. Then the shot went off, and we just ran.

Q And, at that point, you all ran?

A Yes, sir.

Q Where did you run?

A To Kuntrell's house.

Q You run to Kuntrell's house?

A Yes, sir.

Q And his house is on Dugan Street?

A Yes, sir.

Q Okay. Now, do you remember what – now, what happened over at Kuntrell's house?

A I called my grandma to come pick me up.

Q Okay. And, at that point, do you know what happened to the gun after that?

A No, sir.

Q Did you guys talk about what had happened?

A Not really.

Q Okay. You run home, and it never comes back up?

A It just – verbal conversations about what happened. We really ain't talked about it, you know.

Q So when you go to Movie Magic, at that point it's already known that – that – your purpose was to go in there and rob the place, right?

A Yes, sir.

* * *

[Cross Examination of Travis Booker
by Attorney Charles Ellis]

[212] haven't met before, have we?

A No, sir.

Q All right. Who carried the shotgun over there?

A Derrick Shields.

Q All right. Could you speak up? I'm having difficulty hearing you, and I don't know if everybody is –

A Derrick Shields.

Q Derrick Shields?

A Yes, sir.

Q Was it his shotgun?

A Yes, sir.

Q I'm sorry?

A Yes, sir. He had it.

Q Well, how did Derrick carry the shotgun?

A In his right coat sleeve.

Q Well, you and Kuntrell didn't shoot anybody, did you?

A No, sir.

Q Did you two plan to shoot anybody?

A No, sir.

Q Did you get any money?

A No, sir.

Q Did anybody get any money?

A No, sir.

Q Do you know why?

A She said there wasn't no money. When the shot fired, we

* * *

[Closing argument by Deputy
Prosecuting Attorney Curtis Walker]

[301] Now, this doesn't mean that he had to go – he had to actually come out with something. He just goes in with the purpose. I've got to prove that they went in with a purpose.

Two, I've got to prove as well – I've got to prove both of these things. Second, I've got to prove that Kuntrell Jackson, or an accomplice, was armed with a deadly weapon or inflicted death upon another person. Now, that Kuntrell or an accomplice.

You heard Travis' statement. You heard Kuntrell's statement. They both state, yeah, we knew Derrick had the gun. We knew he planned to use it. So it's right there. It's – he has this .410 shotgun. So it's undisputed, we've got an aggravated robbery here.

Now, the question – and – well, another thing is undisputed would be that we have a murder here. That Laurie Troup was shot in the face and died of that injury, and it wasn't self-inflicted. She didn't shoot herself.

Now, you heard Kuntrell's statement, and you've heard Travis, and they both state, yeah, Derrick shot her during the commission of this robbery. Derrick shot her. So that's undisputed.

* * *

[306] No, I'm not saying Kuntrell had the gun. But he was involved in that robbery though. He was

right there telling her, we ain't playing, and Derrick shoots her. According to law, he's just as liable.

Now, there are affirmative defenses to capital murder. Now, going through – the first defense to capital murder is first that he was not the only party to the offense. Now, the defense has to prove this by the preponderance of the evidence, which is less than reasonable doubt. But this is what the defense has to show. That he was not the only party to the offense. That's true. He wasn't the only party to the offense. Derrick Shields and Travis Booker were involved as well.

Second, that he did not commit the homicidal act. He has to prove that up – that has to be shown also. Nobody's saying that Kuntrell committed the homicidal act. We're not saying that he had the gun and shot her. We're not saying that.

Third, that he did not in any way solicit, command, induce, procure, counsel, or aid in its commission. Now, the problem there is, these guys go in without any masks on. These guys go in with the gun not – without masks.

Okay, let's say, they would have grabbed the

* * *

[334] We the jury, find Kuntrell Jackson guilty of capital murder, signed Donald Connor, foreman.

And, we the jury, find Kuntrell Jackson guilty of aggravated robbery, signed Donald A. Connor, foreperson.

Are these your unanimous verdicts, ladies and gentlemen?

JURORS: Yes, sir.

THE COURT: All right. Approach the bench, gentlemen.

(THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH OUT OF THE HEARING OF THE JURY.)

THE COURT: Is there any need to send 'em back on punishment on the aggravated robbery, or can I not merge it in with the capital murder because there's only one sentence. And there's no need for the jury to deliberate on that.

MR. ELLIS: Well, I don't consider – I mean, I agree on the capital – on the capital murder. There isn't probably but one sentence. I'm not sure on the aggravated robbery.

MR. DAVIS: I mean, the sentence doesn't mean much based on the years.

MR. ELLIS: No, it doesn't.

MR. DAVIS: I mean, I don't have a problem with

* * *

[336] (RETURN TO OPEN COURT.)

THE COURT: All right, ladies and gentlemen, your verdicts are in good form and will be accepted by the Court as the verdict in this case.

Ordinarily at this time the Court would instruct you on punishment and ask you to retire to consider punishment. But in view of your verdict, there's only one possible punishment, and the Court will sentence on that. And that will be the end of the case.

So with the thanks of the Court for your consideration of this matter, you're excused and free to go. I want everybody in the audience to just remain seated until the jury has had an opportunity to leave. You're welcome to stay for sentencing if you care to. But you're – you're free to go at this time, and thank you very much. You can use the back stairs if you like, or you're welcome to remain in the courtoom. We're gonna proceed with sentencing.

(JURY EXITING COURTROOM.)

THE COURT: All right. All right, Mr. Jackson, if you'd stand, please, sir.

THE DEFENDANT: (COMPLYING.)

THE COURT: Did you hear the reading of the jury's verdicts finding you guilty of capital murder and aggravated robbery?

[337] THE DEFENDANT: Yes, sir.

THE COURT: Do you have any legal reason to show the Court why sentence should not be imposed at this time?

THE DEFENDANT: Sir?

THE COURT: Do you have any legal reason to give the Court why sentence should not be imposed at this time?

THE DEFENDANT: No.

THE COURT: Do you have anything you want to say before sentence is imposed?

THE DEFENDANT: Yeah, I got something I want to say.

THE COURT: Go ahead.

THE DEFENDANT: I just want to tell you all I'm sorry for your all daughter, but I didn't kill her, and I didn't have nothing to do with the killing.

THE COURT: All right, is there anything else you care to say?

THE DEFENDANT: No.

THE COURT: All right, based upon the jury's verdict finding you guilty of capital murder, you'll be adjudicated guilty of capital murder, and you'll be sentenced to a term of life in the Arkansas Department of Correction without possibility of parole. And that [338] will be the judgment of the Court. And

you'll be remanded to the Sheriff for transportation to the Department of Correction.

You have a right to an appeal. And you need to give notice within 30 days of your intention to appeal, and you need to talk to your lawyer about that decision.

I'm gonna decline bond because this is a capital case, and bond will be denied.

MR. ELLIS: You need to address the aggravated robbery.

THE COURT: Yes, you were also found guilty of aggravated robbery. The Court's going to merge the sentence of aggravated robbery into the life without parole. So that – those two sentences will run together, and that – actually, I'm just not even gonna sentence on the aggravated robbery.

All right, that'll be the judgment of the Court.

(PROCEEDINGS CONCLUDED.)

Defendant's full name:
Kuntrell Obryan Jackson

BOOK 45 PAGE 556-558

JUDGMENT AND COMMITMENT ORDER
IN THE CIRCUIT COURT OF Blytheville, ARKANSAS
Chick DISTRICT Criminal DIVISION

(Filed Jun. 19, 2003)

On June 19, 2003 the Defendant appeared before the Court, was advised of the nature of the charge(s), of constitutional and legal rights, of the effect of a guilty plea upon those rights, and of the right to make a statement before sentencing. The Court made the following findings:

DEFENDANT'S FULL NAME:
Kuntrell Obryan Jackson
DATE OF BIRTH: 11-1-85
RACE: B
SEX: M
SID #:
DEFENDANT'S ATTORNEY: C. Ellis
PROSECUTING ATTORNEY OR DEPUTY:
C. Walker & Brent Davis

CHANGE OF VENUE FROM:

Defendant was represented by

____private counsel ____appointed counsel
__X__public defender ____himself/herself

Defendant made a voluntary, knowing and intelligent waiver of the right to counsel:

____Yes ____No

There being no legal cause shown by the Defendant, as requested, why judgment should not be pronounced, a judgment of conviction is hereby entered against the Defendant on each charge enumerated, fines levied, and court costs assessed. The Defendant is sentenced to the Arkansas Department of Correction (A.D.O.C.) for the term specified on each offense shown below:

TOTAL NUMBER OF COUNTS: Ct I

Offense # 1 Docket #: CR 2001-106
Arrest Tracking #: 633083

A.C.A. # of Offense: 5-10-101

Name of Offense: Capital Murder

Seriousness Level of Offense: 10

Criminal History Score: -0-

Presumptive Sentence: Life w/o Parole

Sentence is a departure from the sentencing guideline grid. ____ Yes __X__ No. N/A

Offense is a __X__ felony ____ misdemeanor.

Classification of offense: __A __B __C __D __U __X__ Y

Sentence imposed: ~~___ months~~. Life w/o Parole

Suspended imposition of sentence: __-0-__ months.

Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection ____ (a) ____ (b) ____ (c) ____ (d).

Sentence was enhanced by A.C.A. _____.

Defendant ____ attempted ____ solicited ____ conspired to commit the offense.

Offense date: 11-18-99

Number of counts: 1

Defendant was on -0- probation -0- parole at time of conviction.

Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. ____ Yes __X__ No.

Victim of the offense was ____ under __X__ over the age of 18 years.

Defendant voluntarily, intelligently, and knowingly entered a

____negotiated plea of guilty or nolo contendere.

____plea directly to the court of guilty or nolo contendere.

Defendant

____entered a plea as shown above and was sentenced by a jury.

____was found guilty of said charge(s) by the court, and sentenced by ____ the court ____ a jury.

__X__was found guilty at a jury trial, and sentenced by __X__ the court ____ a jury.

---

[2] Offense # II

A.C.A. # of Offense: DOES NOT APPLY

Name of Offense:

Seriousness Level of Offense:

Criminal History Score:

Presumptive Sentence:

Sentence is a departure from the sentencing grid. ____ Yes ____ No.

Offense is a ____ felony ____ misdemeanor.

Classification of offense: __A __B __C __D __U __Y

Sentence imposed: ___ months.

Suspended imposition of sentence: ____ months.

Defendant was sentenced as an Habitual Offender under A.C.A. 5-4-501, Subsection ____ (a) ____ (b) ____ (c) ____ (d).

Sentence was enhanced by A.C.A. _____.

Defendant ____ attempted ____ solicited ____ conspired to commit the offense.

Offense date:

Number of counts:

Defendant was on ____ probation ____ parole at time of conviction.

Commitment on this offense is a result of the revocation of Defendant's probation or suspended imposition of sentence. ____ Yes ____ No.

Victim of the offense was ____ under ____ over the age of 18 years.

Defendant voluntarily, intelligently, and knowingly entered a

____ negotiated plea of guilty or nolo contendere.

____ plea directly to the court of guilty or nolo contendere.

Defendant

____ entered a plea as shown above and was sentenced by a jury.

____was found guilty of said charge(s) by the court, and sentenced by ____ the court ____ a jury.
____was found guilty at a jury trial, and sentenced by ____ the court ____ a jury.

---

[3] Indicate which sentences are to run consecutively:

Death Penalty: -0- Execution Date: -0-

[Illegible] time to serve on all offenses listed above: Life w/o Parole months.

Time is to be served at: X Department of Correction ____ Regional Punishment Facility.

Jail time credit: 811 days.

The Defendant was convicted of a target offense under the Community Punishment Act. The Court hereby orders that the Defendant be judicially transferred to the Department of Community Punishment (D.C.P.). ____ Yes X No.

Failure to meet the criteria or violation of the rules of the D.C.P. could result in transfer to the A.D.O.C.

Fines: $ -0- Court Costs: $ -0-

A judgment of restitution is hereby entered against the Defendant in the amount and terms as shown below:

Amount: $ -0- ____Due immediately
____Installments of:

Payment to be made to:

If multiple beneficiaries, give names and show payment priority:

Defendant is a Sex or Child Offender as defined in A.C.A. 12-12-903, and is ordered to complete the Sex Offender Registration Form: ___ Yes _X_ No.

Defendant is alleged to be a Sexually Violent Predator, and is ordered to undergo an evaluation at a facility designated by the Department of Correction Pursuant to A.C.A. 12-12-918: ___ Yes _X_ No.

Defendant was adjudicated guilty of a sex offense, a violent offense, or a repeat offense (as defined in A.C.A. 12-12-1103), and is ordered to have a DNA sample drawn at: ___ a D.C.P. facility ___ the A.D.O.C. or _____ (other): ___ Yes ___ No.

Defendant was informed of his right to appeal: _X_ Yes ___ No.

Appeal Bond: $ NONE

The County Sheriff is hereby ordered to transport the Defendant to _X_ the Arkansas Department of Correction ___ Regional Punishment Facility.

The short report of circumstances attached hereto is approved.

Date: 6-19-03 Circuit Judge: David Burnett

Signature: David Burnett

I certify this is a true and correct record of this Court.

Date: 6-19-03 Donna DiCicco

Circuit Clerk/Deputy: By: /s/ Henrietta Watt D.C.

(Seal) [SEAL]

Form Revised 4/00

[IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ARKANSAS

KUNTRELL JACKSON, Petitioner,

v.

LARRY NORRIS, in his capacity as
DIRECTOR OF THE ARKANSAS DEPARTMENT
OF CORRECTION, Respondent.]

AFFIDAVIT OF DOUGLAS JACKSON

1. My name is Douglas Jackson. I live at 1651 W. Matthews St., Apt. 52 in Jonesboro, Arkansas.

2. Kuntrell Jackson is my younger brother. Our mother is Marie Jackson, but Kuntrell and I have different fathers. We also have three sisters. Kuntrell is the youngest.

3. Our family lived in Blytheville, Arkansas. When Kuntrell was born, we lived in the Chickasaw Courts housing project on the west side of Blytheville. At that time, our family was on welfare. The projects were wild. There were frequent fights and several shootings while we lived there. Drugs were always around in the projects, and there were a good number of crackheads and prostitutes who hung out in certain parts of the complex. There was also a lot of theft. After several years, our family was able to move out of the projects to a home on the east side of Blytheville.

4. Kuntrell's father and our mother were never married, and Kuntrell's father left the family when Kuntrell was very young. Kuntrell did not have much of a relationship with his father.

5. Leander Bobo, our mother's long-time boyfriend, was a father figure to us when we were growing up. Everyone called him "Bobo." Bobo was very fond of my mother's children, especially the boys, and he spent a lot of time with Kuntrell. However, Bobo had a serious drinking problem. This led to many fights between him and our mother. Kuntrell saw a lot of these arguments. I remember at least one fight that left our mother with visible bruises. Bobo's drinking also caused our family financial trouble because he drank up the money and often gambled while he was drunk. This sometimes led to our water or electricity being cut off, especially during our first few years living on the east side.

6. In 1991, soon after we moved out of the projects, our mother went to prison for about a year on battery charges for shooting someone. I had gotten into a fight with a neighbor's daughter who was about my age. The girl's mom pulled a gun on me. I ran to my mother, and she got her own gun. The two women pointed guns at each other and eventually my mom shot the neighbor. Kuntrell was about four years old at the time. While our mother was incarcerated, our family was split up. Kuntrell and I initially lived with Leander Bobo, while our sisters lived with our Aunt Shelby Smith. After Bobo lost his job, Kuntrell and I also [2] moved in with Aunt Shelby.

Kuntrell had an uncle who went to prison around this time.

7. After our mother was released from prison, we all moved into a house on Roosevelt Street on the east side of Blytheville. There were still a lot of fights in this area, and drug users and prostitutes hung around a bar on the corner. Our family, moved several times while Kuntrell was growing up in order to find a safer neighborhood. In addition to the home on Roosevelt Street, we lived on East Rose and West Cleveland. The neighborhood around our home on West Cleveland was particularly bad. There was a lot of activity throughout the night, including drug sales. Our mother always had to call the kids back into the house to avoid trouble.

8. There was a lot of gang activity in Blytheville when Kuntrell was growing up. Blytheville had four main gangs: the Gangster Disciples, the Four Corner Hustlers, the Bloods, and the Crips. Sometimes things between these gangs became really violent. They usually fought over gang territory, since they use their territory to sell drugs.

9. Guns were common in the neighborhoods where Kuntrell grew up. People often pulled guns on each other during arguments. Many of our family members owned guns. Both our mother and Bobo both kept guns in the house. I also owned several guns myself. On one occasion, our grandmother shot her son, Kuntrell's uncle, because he was being disrespectful to her. It seems everyone in our family knows about this story.

10. Because of the neighborhoods we lived in, Kuntrell saw a lot of violence, gang activity, and drug dealing when he was growing up. I believe this caused him to try to act tough.

11. When our sisters Surelonda and Porchala were teenagers, they often had heated arguments with our mother. This sometimes led to them moving out of the house for a while.

11. In 1997, I was incarcerated for robbery. At that time, Kuntrell was eleven years old. After I went to prison, Kuntrell started hanging with the wrong crowd. In prison, I tried to encourage Kuntrell to make the right choices so he would not also wind up in prison. Bobo and our mother broke up while I was incarcerated, and Bobo no longer lived with the family. I was very worried about Kuntrell because he did not have anyone to show him the right path. . . .

[3] 12. Around the same time that I was incarcerated, a fifteen-year-old cousin of Kuntrell's was convicted of first degree murder and sentenced to life without parole. Kuntrell spent a lot of time with this cousin growing up.

13. While I was in prison, I earned a welding certificate, which has enabled me to get a good job now that I have been released. I am now married and have a son. I believe Kuntrell could benefit from the same opportunity to turn his life around and become a productive member of society.

I have read this affidavit. Everything in this affidavit is the truth. I swear under penalty of perjury that the above and foregoing is a true and correct statement.

/s/ Douglas Jackson — 1-7-08
Douglas Jackson — Date

Subscribed and sworn before me on this 7 day of January, 2008.

/s/ Jeffrey Scott Weir — My commission expires
Notary Public — July 23, 2017 .

[IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ARKANSAS

KUNTRELL JACKSON, Petitioner,

v.

LARRY NORRIS, in his capacity as
DIRECTOR OF THE ARKANSAS DEPARTMENT
OF CORRECTION, Respondent.]

AFFIDAVIT OF PORCHALA JACKSON

1. My name is Porchala Jackson. I live at 621 East Rose Street in Blytheville, Arkansas.

2. Kuntrell Jackson is the youngest of the five siblings in our family. From oldest to youngest, the siblings are my sister Surelonda, my brother Douglas, myself, my sister Lequetcha, and Kuntrell. Our mother is named Marie Jackson. Surelonda, Douglas, and I have the same father. Lequetcha and Kuntrell share a different father.

3. I now have three children. I had my first child when I was sixteen years old. My youngest sister Lequetcha had a child around the same time. She was only thirteen years old. Kuntrell was about twelve years old when we had our babies.

4. My older brother Douglas went to prison for aggravated robbery when Kuntrell was eleven years old and I was fifteen years old. Kuntrell always looked up to Douglas and the two spent a lot of time together. They shared a room, and Douglas would often hold Kuntrell when Kuntrell was younger. After Douglas's arrest, Kuntrell

became very upset. The negative change in his behavior was obvious.

5. Kuntrell's biological father, James Peoples, and our mother were never married. Before Kuntrell went to prison, he only saw his father every once in a while. Kuntrell talked about his father a lot. To me, Kuntrell always seemed bothered that his father was not around much.

6. Leander Bobo was Kuntrell's father figure growing up, even though he was actually our mother's long-time boyfriend. Everyone called him "Bobo." Kuntrell and Bobo were always very close. Bobo and our mother broke up when Kuntrell was twelve years old.

7. Kuntrell started getting into trouble with the law when he was around eleven or twelve years old. Kuntrell began associating with cousins and other kids that were often in jail for various crimes, and he spent less time at home with our family. Usually, Kuntrell and these kids would hang out in the public housing projects on the west side of Blytheville.

8. Having lived in Blytheville my whole life, I am very familiar with the housing projects on the west side of town. Our family used to live in these housing projects, but moved out when Kuntrell was five or six years old. After we moved out, my mother always told us kids not to go to the west side housing projects because the area was so dangerous. The housing projects have always been known as one of the worst crime areas in town. This was also true at the time Kuntrell and his friends started spending so much time at the housing projects.

[2] I have read this affidavit. Everything in this affidavit is the truth. I swear under penalty of perjury that the above and foregoing is a true and correct statement.

/s/ Porchala Jackson — 1-7-07
Porchala Jackson — Date

Subscribed and sworn before me on this 7th day of January, 2008.

/s/ Lisa R. Thorp — My commission expires
Notary Public — 10-10-2017 .

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ARKANSAS
ELEVENTH JUDICIAL DISTRICT – WEST
SECOND DIVISION

KUNTRELL JACKSON **PETITIONER**

VS. **NO. CV-2008-28-2**

LARRY NORRIS, DIRECTOR
ARKANSAS DEPARTMENT
OF CORRECTION **RESPONDENT**

ORDER

(Filed Sep. 17, 2008)

Pending before the Court is a Petition for Writ of *Habeas Corpus* filed by the Petitioner, KUNTRELL JACKSON, on January 8, 2008. Also pending is a Motion to Dismiss Petition for Writ of *Habeas Corpus* filed by the Respondent, LARRY NORRIS.

FACTS

Petitioner was convicted by a jury of Capital Murder on June 19, 2003, in the Circuit Court of Mississippi County, Arkansas. Capital Murder is a violation of Ark. Code Ann. § 5-10-101. Punishment for Capital Murder is either death by lethal injection or life in the Arkansas Department of Correction without the possibility of parole. Because the State waived the death penalty in this case, Petitioner was sentenced to life in the Arkansas Department of Correction without parole. Petitioner was fourteen

(14) years old at the time the Capital Murder was committed.

Prior to the jury trial, and in compliance with Ark. Code Ann. § 9-27-318, a Motion to Transfer to Juvenile Court was filed on behalf of the Petitioner. The Circuit Court of [2] Mississippi County held a hearing pursuant to Ark. Code Ann. § 9-27-318 and found by clear and convincing evidence that the Petitioner was not entitled to have his case transferred to the Juvenile Division of Mississippi County Circuit Court. An interlocutory appeal followed and the Arkansas Court of Appeals affirmed the decision of the Mississippi County Circuit Court, denying the transfer to Juvenile Court. *See, Jackson v. State,* WL 193412 (Ark. App.) 2003.

The jury trial was held and on June 19, 2003 the Petitioner was convicted of Capital Murder. Following his conviction, Petitioner appealed and the Supreme Court of Arkansas affirmed his conviction. *See, Jackson v. State,* 359 Ark. 87, 194 S.W.3d 757 (2004). In addition to considering the issues raised on appeal by the Petitioner, the Supreme Court, pursuant to Ark. Sup. Ct. R. 4-3(h), examined the record and all objections abstracted and certified by the State. The Supreme Court held that there were no rulings adverse to the Petitioner which constituted any prejudicial error.

RELIEF SOUGHT

The Petition for Writ of *Habeas Corpus* alleges:

(a) Sentencing a fourteen (14) year old child to die in prison violates that Eighth Amendment's prohibition against cruel and unusual punishment pursuant to *Roper v. Simmons,* 543 U.S. 551 (2005); and,

(b) That the mandatory nature of the sentence for Capital Murder violated Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution.

STANDARD FOR WRIT

To succeed on a petition for writ of *habeas corpus,* Petitioner must show that the Judgment and Commitment Order is invalid on its face or that the trial court lacked [3] jurisdiction, *Davis v. Reed,* 316 Ark. 575, 577, 873 S.W.2d 624, 525 (1994); *Wallace v. Willock,* 301 Ark. 69, 781 S.W.2d 478 (1989). The Petitioner must plead either the facial invalidity or the lack of jurisdiction and make a showing, by affidavit or other evidence, of probable cause to believe he is illegally detained. *Mackey v. Lockhart,* 307 Ark. 321, 323, 819 S.W.2d 702, 704; Ark Code Ann. 16-112-103 (1987).

CONCLUSION

Petitioner does not contend that the Judgment and Commitment Order is invalid on its face and, likewise, does not contend that the Circuit Court of Mississippi County did not have jurisdiction over him. Petitioner's sole argument is that due to his age at the time of the murder, the cruel and unusual clause of the Eighth Amendment to the United States Constitution has been violated. Further, he argues that the mandatory nature of his sentence violates the Eighth and Fourteenth Amendments of the United States Constitution and Article II of the Arkansas Constitution, because the Court was prohibited from considering mitigation evidence. Petitioner was sentenced pursuant to Arkansas Law. His sentence is neither excessive nor is it contrary to Arkansas Law.

A *habeas corpus* proceeding does not afford a petitioner the opportunity to re-try his case. *Mackey v. Lockhart,* 307 Ark. 321, 819 S.W.2d 702 (1991). The remedy available to Petitioner to correct any errors that may have occurred at his trial is a direct appeal. *Birchett v. State,* 303 Ark. 220, 795 S.W.2d 53 (1990). Petitioner had a direct appeal to the Arkansas Supreme Court and pursuant to Ark. Sup. Ct. R. 4-3(h), the entire record was examined and there were no rulings adverse to the Appellant which constituted prejudicial error.

[4] The allegations raised by Petitioner do not demonstrate that the trial court lacked jurisdiction or

that the commitment is invalid on its face. The trial court had personal jurisdiction over Petitioner and jurisdiction over the subject matter thus, had the authority to render the judgment. *See, Johnson v. State,* 298 Ark. 479, 769 S.W2d (1989); *Richie v. State,* 298 Ark. 358, 767 S.W.2d 522 (1989).

Therefore, Petitioner's claims are not cognizable under Ark. Code Ann. §16-112-101 *et seq.*, and his Petition for Writ of *Habeas Corpus* is **DISMISSED.**

IT IS SO ORDERED, this 17th day of September, 2008.

/s/ Robert H. Wyatt. Jr.
ROBERT H. WYATT, JR.
CIRCUIT JUDGE

xc: Office of the Attorney General
Habeas Section
Via-Facsimile: (501) 682-8203

The Equal Justice Initiative of Alabama
Attention: Mr. Bryan A. Stephenson,
Mr. Brandon J. Buskey &
Ms. Alicia A. D'Addario
122 Commerce St.
Montgomery, AL 36104
Via-Facsimile: (334) 269-1806

Cite as 2011 Ark. 49

SUPREME COURT OF ARKANSAS
No. 09-145

KUNTRELL JACKSON, APPELLANT, VS. LARRY NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, APPELLEE,	**Opinion Delivered** February 9, 2011 APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT, NO. CV-08-28-2, HON. ROBERT HOLDEN WYATT, JR., JUDGE, AFFIRMED.

KAREN R. BAKER, Associate Justice

This is an appeal from a denial of a petition for a writ of habeas corpus. Appellant Kuntrell Jackson was convicted of capital murder and aggravated robbery by a jury in Mississippi County Circuit Court on July 19, 2003. After the jury rendered a verdict, the trial court sentenced Jackson to life imprisonment without the possibility of parole. We affirmed. *Jackson v. State,* 359 Ark. 87, 194 S.W.3d 757 (2004). Jackson did not file a petition for postconviction relief.

On January 8, 2008, Jackson filed a petition seeking a writ of habeas corpus in the Jefferson County Circuit Court. The State moved to dismiss the petition. After a hearing, the State's motion to dismiss was granted. In its order dismissing appellant's petition for writ of habeas corpus, the circuit court

found that Jackson failed to demonstrate that his [2] commitment was facially invalid or that the Mississippi County Circuit Court lacked jurisdiction to sentence him to life imprisonment without the possibility of parole. This appeal followed.

Jackson's argument on appeal is that the circuit court erred in denying his petition because it lacked lawful authority to impose the sentence of life imprisonment without the possibility of parole for an offense committed when Jackson was fourteen years old. Jackson specifically argues that the Eighth and Fourteenth Amendments to the United States Constitution and article 2, sections 8 and 9 of the Arkansas Constitution prohibit the mandatory sentencing of children fourteen years of age and younger to life without the possibility of parole. We find no error and affirm.

A writ of habeas corpus will only lie where the commitment is invalid on its face or where the court authorizing the commitment lacked jurisdiction. *Flowers v. Norris,* 347 Ark. 760, 68 S.W.3d 289 (2002); *McKinnon v. Norris,* 366 Ark. 404, 231 S.W.3d 725 (2006) (per curiam). The writ may be granted where a petitioner pleads either facial invalidity or lack of jurisdiction and makes a "showing, by affidavit or other evidence, [of] probable cause to believe" he is so detained. *See* Ark. Code Ann. § 16-112-103 (Repl. 2006). This court has recognized that detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct. *See Bangs v. State,* 310 Ark. 235, 835 S.W.2d 294 (1992); *see also Friend v.*

Norris, 364 Ark. 315, 219 S.W.3d 123 (2005) (per curiam); *Meny v. Norris,* 340 Ark. 418, 13 S.W.3d 143 (2000) (per curiam).

[3] Jackson argues that his sentence is unusual, excessive, and in violation of his rights under the Eighth and Fourteenth Amendments of the U.S. Constitution, as well as article 2, sections 8 and 9 of the Arkansas Constitution. Jackson correctly notes that a sentence of life imprisonment without the possibility of parole is the penultimate punishment under Arkansas law, exceeded only by the death penalty. For capital offenses, the legislature has proscribed only these two punishments. *See* Ark. Code Ann. § 5-4-615 (Repl. 1997).

In Arkansas, sentencing is entirely a matter of statute, and this court defers to the legislature in all matters related to sentencing. *See* Ark. Code Ann. § 5-4-104(a) (Rep. 1997); *State v. Britt,* 368 Ark. 273, 244 S.W.3d 665 (2006). Where the law does not authorize the particular sentence pronounced by a trial court, the sentence is unauthorized and illegal, and the case must be reversed and remanded; however, if a sentence is within the limits set by the legislature, it is legal. *State v. Joslin,* 364 Ark. 545, 222 S.W.3d 168 (2006); *Porter v. State,* 281 Ark. 277, 663 S.W.2d 723 (1984). We have specifically rejected the claim that a sentence of life imprisonment without parole violates the Eighth Amendment of the United States Constitution's prohibition against cruel or unusual punishment and stated that such a sentence is not unconstitutionally excessive when it is within the

statutory bounds. *See Dyas v. State,* 260 Ark. 303, 539 S.W.2d 251 (1976).

This court has held that if the sentence fixed by the trial court is within legislative limits, we are not free to reduce it even though we might consider it to be unduly harsh, with three extremely narrow exceptions: (1) where the punishment resulted from passion or [4] prejudice; (2) where it was a clear abuse of the jury's discretion; or (3) where it was so wholly disproportionate to the nature of the offense so as to shock the moral sense of the community. *Bunch v. State,* 344 Ark. 730, 43 S.W.3d 132 (2001). In *Bunch,* the court concluded that none of the three exceptions applied where the life-imprisonment punishment was mandated by the legislature and had been determined by the Supreme Court in *Harmelin v. Michigan,* 501 U.S. 957 (1991), as not violative of the Eighth Amendment. *Id.* Likewise, in the instant case, the sentencing court imposed a sentence of life imprisonment without parole, which is the sentence mandated by the legislature and one that we have determined to be constitutional when imposed within the statutory bounds.

Jackson also contends that dismissing his petition was erroneous because his sentence violated his federal constitutional rights pursuant to *Roper v. Simmons,* 543 U.S. 551 (2005), as extended by the Supreme Court last year to cases with juvenile defendants involving a sentence of life imprisonment without the possibility of parole for nonhomicide crimes by *Graham v. Florida,* ___ U.S. ___, 130 S. Ct. 2011

(2010). In *Roper*, the Court held that execution of criminal defendants who are juveniles at the time the crime was committed is prohibited by the Eighth and Fourteenth Amendments, but clearly limited its holding to death-penalty cases involving juveniles: "Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force." *Roper*, 543 U.S. at 568. The Court expressly noted that although the execution of a juvenile is impermissible under the Eighth and Fourteenth Amendments, sentencing a juvenile to life imprisonment is not. [5] *Id.* at 578-79.

The Supreme Court's decision in *Graham* marked the first time the Court elected to extend a categorical ban on a particular type of punishment in a case that did not involve the death penalty. The Court in *Graham* employed a categorical analysis in reaching its conclusion that sentencing juveniles to life imprisonment without parole was excessive for nonhomicide offenses; however, the Court limited its ban to *nonhomicide* crimes. *Graham*, 130 S. Ct. at 2030. In reaching its conclusion, the Court specifically acknowledged this distinction between homicide and nonhomicide offenses, noting that "[t]here is a line 'between homicide and other serious violent offenses against the individual.'" *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). The Court's holdings in *Roper* and *Graham* are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile. We decline to

extend the Court's bans to homicide cases involving a juvenile where the death penalty is not at issue.

Jackson has failed to allege or show that the original commitment was invalid on its face or that the original sentencing court lacked jurisdiction to enter the sentence. We hold that the circuit court's dismissal of the petition for writ of habeas corpus was not clearly erroneous.

Affirmed.

BROWN, J., concurs.

CORBIN, J., and DANIELSON, J., dissent.

[6] ROBERT L. BROWN, Justice, concurring. I concur in the decision. The majority is correct that the United States Supreme Court has held that sentencing juveniles to life in prison without parole for non-homicidal offenses violates the Eighth Amendment prohibition in the United States Constitution against cruel and unusual punishment. *Graham v. Florida,* 130 S. Ct. 2011 (2010). The case before us, however, is a homicide case, which renders *Graham* inapposite. There is no case from the United States Supreme Court finding a comparable violation of the Eighth Amendment for juveniles sentenced to life without parole for felony murder. That Court, of course, is the last word on the extent of Eighth Amendment protection. *Arkansas v. Sullivan,* 532 U.S. 769 (2001) (per curiam).

The majority is also correct that sentencing for crimes upon conviction is entirely a matter of statute. Ark. Code Ann. § 5-4-104(a) (Repl. 1997); *State v. Britt*, 368 Ark. 273, 244 S.W.3d 665 (2006). And once there is a conviction for capital murder for juveniles, life without parole for the offender becomes the mandatory sentence without any requirement for a presentence hearing. Ark. Code Ann. § 5-4-602(3)(B)(ii) (Repl. 2006). Hence, for Kuntrell Jackson, who was age fourteen at the time of the crime, his only remedy to avoid spending the rest of his life in prison afer the conviction for capital murder is executive clemency from the governor.

I agree with Jackson's argument that this state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life without the possibility of parole. Here, Jackson maintains he was not the [7] trigger man in the homicide, and, indeed, he was convicted of a murder that occurred in the course of committing a felony – not deliberated or premeditated murder. Ark. Code Ann. § 5-10-101.

Hearing those factors at a sentencing-phase hearing may well have convinced the jury that life without parole was too severe and not appropriate in light of Jackson's age and circumstances. As it stands today, no sentencing hearing for a juvenile is available by statute once the death penalty is no longer an option and a conviction for capital murder has been had.

The General Assembly should examine this part of the criminal code to determine whether a sentencing hearing is appropriate before a mandatory sentence of life without parole is imposed on a person who was a juvenile at the time of the homicide and when the basis for the conviction is not premeditated murder but felony murder.

PAUL E. DANIELSON, Justice, dissenting. I respectfully dissent from the majority's decision to affirm the denial of habeas relief in the instant case. I understand that the sentence fixed by the circuit court was within legislative limits; however, I disagree that this is not a case in which the particular facts allow us, if not require us, to provide relief.

Appellant Kuntrell Jackson was barely fourteen on the night of the incident that led to his arrest. He was walking with an older cousin and friend, Travis Booker and Derrick Shields, through the Chickasaw Courts housing project in Blytheville when the boys began discussing the idea of robbing the Movie Magic video store. On the way to Movie Magic, [8] Jackson became aware of the fact that Shields was carrying a sawed-off .410 gauge shotgun in his coat sleeve. When they arrived at the store, Shields and Booker went in, but Jackson elected to remain outside by the door. Shields pointed the shot gun at the video clerk, Laurie Troup, and demanded that she "give up the money." Troup told Shields that she did not have any money. A few moments later, Jackson went inside.

Shields demanded that Troup give up the money five or six more times, and each time she refused. After Troup mentioned something about calling the police, Shields shot her in the face. The three boys then fled to Jackson's house without taking any money.

Jackson was tried as an adult and convicted of capital murder when, pursuant to Ark. Code Ann. § 5-10-101(a)(1) (Repl. 1997), the State proved that Jackson attempted to commit or committed an aggravated robbery and, in the course of that offense, he, *or an accomplice*, caused Troup's death under circumstances manifesting an extreme indifference to the value of human life. The only sentence available for that conviction was death or life imprisonment without parole. *See* Ark. Code Ann. § 5-10-101(c)(1). Jackson was sentenced to life imprisonment without the possibility of parole.

As noted by the majority, our United States Supreme Court has held that not only does the execution of criminal defendants who are juveniles violate the Eighth and Fourteenth Amendments, sentencing a juvenile to life imprisonment without the possibility of parole is also an excessive punishment in violation of the Eighth and Fourteenth Amendments for a nonhomicide offense. *See Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011 (2010). The facts [9] in *Graham* are not terribly different from the facts in the instant case, except that the victim in *Graham* did not die from Graham's accomplice's physical attack:

> In July 2003, when Graham was age 16, he and three other school-age youths attempted to rob a barbeque restaurant in Jacksonville, Florida. One youth, who worked at the restaurant, left the back door unlocked just before closing time. Graham and another youth, wearing masks, entered through the unlocked door. Graham's masked accomplice twice struck the restaurant manager in the back of the head with a metal bar. When the manager started yelling at the assailant and Graham, the two youths ran out and escaped in a car driven by the third accomplice. The restaurant manager required stitches for his head injury. No money was taken.

Id. at ___, 130 S. Ct. at 2018. Graham was charged as an adult for the armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole; and attempted armed-robbery, a second-degree felony carrying a maximum penalty of fifteen years' imprisonment. *See Graham, supra.* Graham pleaded guilty to both charges under a plea agreement, which was accepted by the trial court. *See id.* He was then placed on probation after serving some jail time. *See id.* Graham was actually only sentenced to life imprisonment by the trial court after violating the terms of his probation by engaging in subsequent criminal activity. *See id.*

In analyzing whether this sentence was constitutional under the Eighth Amendment, the Supreme Court noted that:

> [W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.
>
> . . . .
>
> Here one cannot dispute that this defendant posed an immediate risk, [10] for he had committed, we can assume, serious crimes early in his term of supervised release and despite his own assurances of reform. Graham deserved to be separated from society for some time in order to prevent what the trial court described as an "escalating pattern of criminal conduct," App. 394, but it does not follow that he would be a risk to society for the rest of his life. Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity.

Id. at ___, 130 S. Ct. at 2027, 2029.

In the instant case, Jackson did not kill and any evidence of intent to kill was severely lacking. He

never possessed the weapon, he was not the shooter, and his involvement in the robbery was limited. While he was convicted of capital murder, that conviction was only obtained by proving that he was an accomplice, and his accomplice took someone's life in the course of a felony, the aggravated robbery. Jackson's involvement in the robbery was no more, if not less than, Graham's involvement had been. I simply cannot ignore the fact that the analysis of the United States Supreme Court in *Graham* applies to the juvenile defendant in the instant case, regardless of the fact that, in the instant case, the prosecution was able to secure a capital-murder conviction through our felony-murder statute.

Also of great concern to me is that once Jackson was convicted, the circuit court had no discretion in sentencing. At the time of sentencing, the circuit court could not consider the defendant's age or any other mitigating circumstances – the circuit court only had jurisdiction to sentence Jackson to life imprisonment without the possibility of parole. "An [11] offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." *Graham*, ___ U.S. ___, 130 S. Ct. at 2031.

For these reasons, I believe that the sentence as applied in the instant case violates the prohibition against cruel and unusual punishment found in the Eighth and Fourteenth Amendments of the United States Constitution and article 2, section 9 of the Arkansas Constitution and, therefore, is illegal.

Detention for an illegal period of time is precisely what a writ of habeas corpus is designed to correct. *See Taylor v. State*, 354 Ark. 450, 125 S.W.3d 174 (2003). Accordingly, I would reverse the denial of Jackson's petition for a writ of habeas corpus.

CORBIN, J., joins.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 7, 2011

Mr. Bryan A. Stevenson
Equal Justice Initiative
122 Commerce Street
Montgomery, AL 36104

Re: Kuntrell Jackson
v. Ray Hobbs, Director, Arkansas Department of Correction No. 10-9647

Dear Mr. Stevenson:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The case is to be argued in tandem with No. 10-9646, Miller v. Alabama."

* * *

Sincerely,

William K. Suter, Clerk

by /s/ D J McNerney
Denise J. McNerney
Merits Cases Clerk

Enclosures

PETITIONER'S BRIEF

RECORD

No. 10-9647

FILED

In The
Supreme Court of the United States

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF FOR PETITIONER

BRYAN A. STEVENSON*
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Library

QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a 14-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon this 14-year-old petitioner, who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a 14-year-old child as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES viii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

ARGUMENT: THE CONSTITUTIONAL LOGIC OF *ROPER V. SIMMONS* AND *GRAHAM V. FLORIDA* CONTROLS THIS CASE 6

A. The Components of This Court's Decisions in *Roper* and *Graham* 9

1. Children Are Different From Adults in Ways That Bear Directly on the Question of Culpability Central to Eighth Amendment Excessiveness Analysis 9

a. This Court Has Recognized That Children Are Involuntarily and Particularly Susceptible to Physical and Psychological Drives That Can Lead Them Into Criminal Behavior 10

b. This Court Has Recognized That Children Innately Lack Mature Behavioral Controls 10

TABLE OF CONTENTS – Continued

Page

c. This Court Has Recognized That Children, Through No Fault of Their Own, Lack Resources Necessary to Choose Their Environment and Mode of Life 11

d. This Court Has Recognized That Children Are Not Solely Responsible for the Conditions That Have Shaped Them 12

e. This Court Has Recognized That Children Are Works-In-Progress, Capable of Change and Likely to Change 12

f. This Court Has Recognized That Objective Indicators Demonstrate a Societal Understanding That the Preceding Conditions Exist and That They Are Relevant to Culpability 14

B. How the Reasoning of *Roper* and *Graham* Applies to Young Adolescents Sentenced to Life Imprisonment Without Parole 16

1. The Scientific Consensus on Adolescent Development 16

a. Young Adolescents Have Not Yet Developed the Capacity to Make Mature and Responsible Decisions 19

TABLE OF CONTENTS – Continued

Page

b. Young Adolescents Are Especially Susceptible to Risk-Taking Impulses and Negative Peer Influences 23

c. Young Adolescents Have Not Yet Begun to Form Their Own Identities or to Imagine Their Futures 25

2. The Constitutional Significance of Young Adolescents' Limited Cognitive Capacity and Psychosocial Immaturity 28

C. Hundreds of State and Federal Laws Recognize the Special Vulnerabilities and Deficiencies of Young Adolescents 29

1. State and Federal Law Recognizes That Young Adolescents Are Especially Vulnerable and Provides Heightened Protection from Exploitation and Abuse 30

2. State and Federal Law Recognizes That Early Adolescents Are Immature, Impulsive, and Relatively Irresponsible, as Well as That They Are Exceedingly Susceptible to Coercion, by Limiting Their Rights and Responsibilities in Many Aspects of Life 33

D. The Distinctive Characteristics of Young Adolescents Recognized in State, Federal, and Constitutional Law Undermine the Legitimacy and Utility of Life-Without-Parole Sentences for Young Teens 34

TABLE OF CONTENTS – Continued

Page

1. Some of These Characteristics Bear Directly on the Degree of Culpability That Can Be Found to Attach to Adolescent Criminal Behavior 35

2. Some of These Characteristics Bear on the Inutility of Life Without Parole as a Deterrent 36

3. Some of These Characteristics Bear on the Risks of Wrongful Conviction (Or Degree of Conviction) and on the Even More Serious Risks of Erroneous Judgment Regarding Appropriate Sentence 37

4. The Severe, Terminal Sanction of Life Without Parole Is Inappropriate for Young Adolescents Because the Retributive, Deterrent, and Incapacitative Virtues of Such a Punishment Are Attenuated in Their Cases 40

E. Objective Indicia Demonstrate That There Is a Consensus Against Imposing Sentences of Life Imprisonment Without Parole Upon Young Adolescents..... 41

1. Life Without Parole for Young Adolescents Is an Unconsidered Consequence of Two Distinct Legislative Developments 43

TABLE OF CONTENTS – Continued

Page

2. Virtually Every State That Has Expressly Addressed the Question of the Minimum Age of Eligibility for a Life-Without-Parole Sentence Has Set the Age Above 14 45

3. In Actual Practice, the Imposition of a Life-Without-Parole Sentence on a Young Teenager Is an Aberrant, Exceedingly Rare Occurrence 47

F. There Is No Legal, Empirical, or Practical Justification for Disregarding in Homicide Cases the Findings of *Roper* and *Graham* That Salient Differences Between Young Teens and Adults Bear Directly on the Question of Culpability Central to the Eighth Amendment Excessiveness Analysis 52

1. Young Teens Convicted of Homicide Are Indistinguishable from Those Convicted of Nonhomicide Offenses Under This Court's Reasoning in *Roper* and *Graham* 52

2. The "Super-Predator" Is An Exploded Myth That Cannot Justify Sentencing Young Teens to Life Without Parole 54

3. Principled, Practical Procedures Are Available to Assure Against Improvident Release of Young Teens Imprisoned for Homicide 57

TABLE OF CONTENTS – Continued

Page

G. Appropriate Categorical Lines Can Readily Be Drawn 59

H. The Constitutional Rule of *Graham* Would Be Stripped of Intelligible Meaning If It Were Held Inapplicable to the Mandatory Life-Without-Parole Sentence Imposed on 14-Year-Old Kuntrell Jackson for a Homicide Crime Attributed to Him Through Accessorial Felony-Murder Doctrines 63

CONCLUSION 66

APPENDIX

APPENDIX A States in Which Children 13 and Older Are Exposed to a Sentence of Life Without Parole ..... App. 1

APPENDIX B States in Which Children 14 and Older Are Exposed to a Sentence of Life Without Parole ..... App. 3

TABLE OF AUTHORITIES

Page

CASES

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Page

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Page

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Page

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Page

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Page

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OPINIONS BELOW

The majority, concurring, and dissenting opinions in the Arkansas Supreme Court below are reported at 2011 Ark. 49 and appear at J.A. 77-89. The order of the Jefferson County Circuit Court is unreported and is found at J.A. 72-76. The Arkansas Supreme Court opinion affirming Kuntrell Jackson's conviction on direct appeal is *Jackson v. State*, 359 Ark. 87, 194 S.W.3d 757 (Ark. 2004).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Arkansas Supreme Court's judgment was entered February 9, 2011. The petition for certiorari was filed March 21, 2011.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It bears upon the States through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Kuntrell Jackson was sentenced to life imprisonment without parole for felony murder occurring during a robbery incident on November 18, 1999, less than three weeks after his 14th birthday. The State's evidence showed that Kuntrell and two older boys, Derrick Shields and Travis Booker (Kuntrell's cousin), were walking through a housing project when they began discussing the idea of robbing a local video store. *Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004). Kuntrell then became aware that Shields was carrying a shotgun in his coat sleeve. *Id.* At the store, the two older boys entered; Kuntrell chose to stay outside. *Id.* Inside, Shields pointed his gun at a clerk and demanded money six or seven times. *Id.* at 758-59. The clerk refused. *Id.* at 759. During this exchange, Kuntrell entered the store. *Id.* When the clerk threatened to call the police, Shields shot and killed her. *Id.* The boys ran from the store. *Id.* They did not take any money. *Id.*

The prosecutor exercised his discretion under Arkansas Code § 9-27-318(c) to charge Kuntrell as an adult with one count of capital felony murder (Ark. Code Ann. § 5-10-101) and one count of aggravated robbery (Ark. Code Ann. § 5-12-103). J.A. 42-43. Following the trial court's refusal to transfer the case to juvenile court, *Jackson v. State*, No. CA 02-535, 2003 WL 193412 (Ark. Ct. App. Jan. 29, 2003), Kuntrell was convicted of capital felony murder and aggravated robbery on July 19, 2003. J.A. 53-54. The judge, legally barred from considering Kuntrell's

age, character, individual circumstances, or degree of involvement in the offense, imposed a mandatory sentence of life without parole on the capital-murder conviction. J.A. 54-57. The Arkansas Supreme Court affirmed without reviewing the propriety of the sentence. *Jackson*, 194 S.W.3d at 762.

On January 8, 2008, following this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), Kuntrell filed a petition for habeas corpus under Arkansas Code § 16-112-101 *et seq.*, in the Jefferson County Circuit Court. Kuntrell's petition asserted that the Eighth and Fourteenth Amendments prohibit a mandatory sentence of life without parole for a 14-year-old child who was not the trigger person and who did not intend to kill. The State filed a motion to dismiss. After a non-evidentiary hearing, the circuit court granted the State's motion on September 17, 2008. J.A. 72-76.

Kuntrell appealed to the Arkansas Supreme Court. While his appeal was pending, this Court decided *Graham v. Florida*, 130 S. Ct. 2011 (2010), holding that juveniles cannot be sentenced to life without parole for nonhomicide offenses. Kuntrell was granted leave to file a supplemental brief regarding *Graham*. It made three arguments. First, *Graham* confirms Kuntrell's basic submission that juveniles can assert categorical challenges to life-without-parole sentences under the Eighth and Fourteenth Amendments. Second, *Graham*'s recognition that a young person's age must constitutionally be considered at sentencing prohibits mandatory sentences

of life without parole for juveniles. Third, because Kuntrell did not commit the shooting and did not intend the victim's death, *Graham* invalidates his life-without-parole sentence.

The Arkansas Supreme Court affirmed Kuntrell's sentence on February 9, 2011. J.A. 77-82. Addressing the merits of Kuntrell's Eighth and Fourteenth Amendment claims, the Arkansas Supreme Court concluded that "[t]he [United States Supreme] Court's holdings in *Roper* and *Graham* are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for non-homicide offenses involving a juvenile." J.A. 81. A four-justice majority therefore "decline[d] to extend the Court's bans to homicide cases involving a juvenile where the death penalty is not at issue." J.A. 81-82. Two justices dissented from the court's judgment. J.A. 84-89. They concluded that *Graham* rendered Kuntrell's sentence unconstitutional because the state failed to prove that he had any intent to kill. J.A. 87-88. The dissenters emphasized that Kuntrell's role in the offense was "no more, if not less than, Graham's involvement had been." J.A. 88. They noted that Kuntrell's mandatory sentence did not take account of his young age or other mitigating circumstances, as *Graham* requires. J.A. 88. A third justice wrote a separate concurrence to note that he "agree[d] with [Kuntrell's] argument that this state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life

without the possibility of parole." J.A. 83. Such individualized consideration in Kuntrell's case "may well have convinced the jury that life without parole was too severe and not appropriate in light of [Kuntrell's] age and circumstances." J.A. 83.

SUMMARY OF ARGUMENT

Graham v. Florida, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), identified numerous features of adolescence that make teen offenders less culpable than adults: Biologically and psychologically, teens are given to impulsive, heedless, sensation-seeking behavior and excessive peer pressure. Through inexperience and neurological underdevelopment, they lack mature behavioral controls. They are shaped by environments they did not choose and cannot change or escape. Their youthful characters are transitory, their adult characters unpredictable.

These features are widely recognized by our legal and cultural institutions. Each bears centrally on the retributive, deterrent, and incapacitative justifications for life-without-parole sentences. *Graham*'s reasons for finding the justifications lacking apply no less to murder than other crimes. *Roper* so holds.

Life-without-parole homicide sentences for young teens are vanishingly rare. Homicides by young teens are themselves infrequent. No pragmatic difficulty – including the doctrinal problem of drawing an age

line – warrants abandoning all *Graham*'s logic in murder cases.

ARGUMENT

THE CONSTITUTIONAL LOGIC OF *ROPER V. SIMMONS* AND *GRAHAM V. FLORIDA* CONTROLS THIS CASE.

In recent years, this Court has twice addressed the application of the Eighth Amendment to harsh penalties imposed on children. Each time, it has recognized that the substantial differences between children and adults are constitutionally relevant. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court found that, even in the most serious murder cases, three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. As compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." *Id.* at 569-70 (citation omitted). Because these differences make juveniles less culpable than adults, this Court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573-74.

In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Court recognized that the same differences between children and adults are relevant to the constitutionality of sentences of life imprisonment without parole. *Id.* at 2026-27. Reviewing the case of a 16-year-old convicted of armed burglary, the Court repeated *Roper*'s reasoning "that because juveniles have lessened culpability they are less deserving of the most severe punishments" (*id.* at 2026) in concluding categorically that life without parole is excessive for juvenile nonhomicide offenders (*id.* at 2030). Thus, this Court has now held: (1) that even those juveniles who have committed the most aggravated murders cannot be treated as equivalent to adults in Eighth Amendment excessive-punishment analysis (*Roper*, 543 U.S. at 570-74) and (2) that similar considerations – taking account of the categorical differences between juvenile and adult offenders – must inform Eighth Amendment analysis of the permissibility of imposing life-without-parole sentences on juveniles (*Graham*, 130 S. Ct. at 2026-29).

Graham began this latter, specific analysis by tracking and reaffirming *Roper*'s reading of the well-informed contemporary understanding of the common characteristics of young people. It cited scientific studies of adolescent brain structure and functioning which confirm the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later

in life. It was these ubiquitous features of youth that led the Court to conclude that "it would be misguided to equate the failings of a minor with those of an adult" (*Graham*, 130 S. Ct. at 2026 [citing *Roper*, 543 U.S. at 569-70]) and that the Eighth Amendment "forbid[s] States from making the judgment at the outset that . . . [young] offenders never will be fit to reenter society" (130 S. Ct. at 2030).

Logically, the identical features of youth compel two additional conclusions. First, adolescents' "lessened culpability" cannot rationally be supposed to be crime-specific. Whatever developmental immaturity, impulsivity, and situational vulnerability set the scene for a teenager's participation in a home-invasion robbery will be operating similarly when he or she is drawn into conduct constituting robbery-murder. Second, by every measure deemed relevant in *Roper* and *Graham*, the younger a child is, the more compelling are the distinctions between children and adults and the less culpable children are as a class compared to adults. And in the case of children 14 or younger, nationwide practice unmistakably reinforces these conclusions: life-without-parole sentences for murder in this age group are particularly rare. Thus, every factor which the Court considered crucial for the results in *Roper* and *Graham* equally or more strongly compels the invalidation of Kuntrell Jackson's life-without-parole sentence.

A. The Components of This Court's Decisions in *Roper* and *Graham*

1. Children Are Different From Adults in Ways That Bear Directly on the Question of Culpability Central to Eighth Amendment Excessiveness Analysis.

The core of this Court's reasoning in *Roper* and *Graham* is that children are not simply miniature adults. Through no fault of their own, they are at a unique stage of development that makes them peculiarly susceptible to physical and psychological pressures toward risk-taking, and they are not yet adequately equipped with the capacity for mature behavioral controls. They lack the resources to choose their environments and avoid negative influences; those environments are created and controlled by the adults around them. Because "their characters are 'not as well formed,'" *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 570), they have the innate potential for change and rehabilitation. Society's recognition of these well-known facts is reflected both in its actual practices when sentencing teens convicted of violent crimes and in its innumerable laws designed to protect teens from dangers including their own immature judgment.

a. This Court Has Recognized That Children Are Involuntarily and Particularly Susceptible to Physical and Psychological Drives That Can Lead Them Into Criminal Behavior.

Roper and *Graham* both recognized that a salient difference between children and adults is that children's immaturity and turbulent impulses render them peculiarly susceptible to engaging in thoughtless, rash, risky behavior. A "'lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569 (citation omitted); *accord*: *Graham*, 130 S. Ct. at 2028; and see *id.* at 2032, observing that teens have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." Thus, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (citation omitted).

b. This Court Has Recognized That Children Innately Lack Mature Behavioral Controls.

Both *Roper* and *Graham* also recognized that teens have underdeveloped capacities for behavioral control. *Roper* noted that "scientific and sociological studies" of adolescent development confirm what "any parent knows": teens lack adult powers of self-control.

543 U.S. at 569. In *Graham*, the Court found *Roper*'s conclusions buttressed by "developments in psychology and brain science continu[ing] to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." 130 S. Ct. at 2026. These findings informed the Court's judgment that "'the case for retribution is not as strong with a minor as with an adult'" and that "'juveniles will be less susceptible to deterrence.'" *Id.* at 2028 (citation omitted).

c. This Court Has Recognized That Children, Through No Fault of Their Own, Lack Resources Necessary to Choose Their Environment and Mode of Life.

Roper and *Graham* also recognized that children lack both legal and practical capacity to escape from harmful environments. Teens "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569; *see also Graham*, 130 S. Ct. at 2026. They "have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569. For this reason, "'youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'" *Id.* (citation omitted).

d. This Court Has Recognized That Children Are Not Solely Responsible for the Conditions That Have Shaped Them.

This Court has also recognized that children are, in A.E. Housman's sense, "stranger[s] and afraid / In a world . . . [they] never made."[1] The adults around them largely dictate and therefore share responsibility for the circumstances of their lives. "'[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.'" *Roper*, 543 U.S. at 569 (citation omitted). Teens' "own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570.

e. This Court Has Recognized That Children Are Works-In-Progress, Capable of Change and Likely to Change.

A central tenet of both *Roper* and *Graham* was that the final character of a child is as yet unknown and unknowable because children have an inherent potential for growth, change, rehabilitation. "'[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years

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[1] *Last Poems, XII in Collected Poems* 117 (2d ed. 1961).

can subside.'" *Roper*, 543 U.S. at 570 (citation omitted). "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570. Even in the case of an aggravated homicide, a juvenile's culpability cannot be equated with that of an adult, because "a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*; *accord Graham*, 130 S. Ct. at 2026-27.

This Court has also recognized that, not only are teens capable of change, but most teens actually will change as an inevitable part of growing up. "'For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 570 (citation omitted). For this reason, the *Graham* Court found that:

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose

> crime reflects irreparable corruption." *Roper*, [543 U.S.] at 572.

Graham, 130 S. Ct. at 2029.

f. This Court Has Recognized That Objective Indicators Demonstrate a Societal Understanding That the Preceding Conditions Exist and That They Are Relevant to Culpability.

Both *Roper* and *Graham* also noted that these facts of adolescent life are pervasively acknowledged in a societal consensus marked by objective indicators of several sorts. "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Roper*, 543 U.S. at 569.[2] In *Roper*, the Court found that even when juveniles have committed aggravated homicides, "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice . . . provide sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" 543

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[2] See also *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011): "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."

U.S. at 567 (citation omitted). In *Graham*, the Court identified only 123 juveniles sentenced to life without parole for nonhomicide offenses "stretching back many years," and found that "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders – and most of those do so quite rarely." 130 S. Ct. at 2024. Considering that many thousands of juveniles are arrested for serious felonies each year, "in proportion to the opportunities for its imposition" such sentences are extremely rare. *Id.* at 2025. The Court concluded that the rarity of these sentences reflected a societal consensus that the incorrigibility necessary to justify a life without parole sentence is "'inconsistent with youth.'" *Id.* at 2029 (citation omitted).

* * *

The following sections of this brief will: (1) show that this Court's recognition of the special nature and circumstances of adolescence is factually indisputable, (2) detail the specific components of the difference between young adolescents and adults, and (3) show how those details confirm the full applicability of the reasoning of *Roper* and *Graham* to children like Kuntrell Jackson. Ultimately, nothing in the constitutional analysis established by the *Roper* and *Graham* opinions and nothing in the real-world facts and conditions relevant to that analysis permits a rational distinction between life without parole for children who commit murder and life without parole for children who commit other serious crimes, particularly in the case of children 14 and younger.

B. How the Reasoning of *Roper* and *Graham* Applies to Young Adolescents Sentenced to Life Imprisonment Without Parole

Graham pinpoints the constitutional vice in sentencing children to life imprisonment without parole: a lifelong, unchangeable sentence "requires the sentencer to make a judgment that the juvenile is incorrigible . . . [while t]he characteristics of juveniles make that judgment questionable." 130 S. Ct. at 2029. Because a child is not yet what he will be, "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id.* at 2029. To declare a 14-year-old like Kuntrell Jackson forever unfit to live in society violates "the duty of the government to respect the dignity of all persons," *Roper*, 543 U.S. at 560. This is all the more unjustifiable because children's "struggle to define their identity," *id.* at 570, *is* a struggle, bringing with it unique, temporary impairments and vulnerabilities that reduce their criminal culpability.

1. The Scientific Consensus on Adolescent Development

Contemporary psychological, sociological, and neurological studies converge[3] to demonstrate that

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[3] The convergence of the research in multiple disciplines makes the scientific consensus particularly strong. *See* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psychol. 739, 744 (2009).

the factors which *Roper* and *Graham* recognized as critical for Eighth Amendment analysis in the case of children – changeability, immature judgment, underdeveloped capacity for self-regulation, vulnerability to negative influences and outside pressures, and a lack of control over either their own impulses or their environment – are at their peak in young teens. This is the onset of the crucial developmental period of adolescence, bringing radical transformations that include the stressful physical changes of puberty (increases in height and weight and sex-related physiology), followed later by progressive gains in capacity for reasoned, mature judgment, impulse control, and autonomy.[4] A "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[5]

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[4] Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 Pharmacol. Biochem. Behav. 212, 212 (2009); *and see* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 434-36 (2000) (discussing radical hormonal changes in adolescence).

[5] Laurence Steinberg, Elizabeth Cauffman, et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by*

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"The temporal gap between the arousal of the socio-emotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk taking during middle adolescence."[6]

These biological and psychosocial developments explain what is obvious to parents, teachers, and any adult who reflects back on his or her own teenage years: 13- and 14-year-old middle-schoolers lack the maturity, independence, and future orientation that adults, and even older teens, have acquired over the course of adolescence. While 16- and 17-year-olds are working after-school jobs to save up for their first car and applying to college, 13- and 14-year-olds are agonizing about who will sit with them at lunch. Graduating seniors are thinking about their future careers and families, while seventh-graders are fixated on who will be their "BFF"[7] that day. Among adolescents, young teens have the least capacity to imagine consequences, regulate their wildly-shifting emotions, and resist peer pressure, and the most capacity for change, precisely because they are at the

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Behavior and Self-Report: Evidence for a Dual Systems Model, 44 Dev. Psychol. 1764, 1764 (2008).

[6] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

[7] Text message shorthand for, ironically, "Best Friends Forever." *The NetLingo List of Acronyms & Text Message Shorthand*, NetLingo.com, http://www.netlingo.com/acronyms.php (last visited Jan. 3, 2012).

beginning of the most intense period of rapid growth in their lifetimes.[8]

a. Young Adolescents Have Not Yet Developed the Capacity to Make Mature and Responsible Decisions.

By the standards of adults or even older adolescents,[9] the judgment of young teenagers is multiply handicapped: they lack life experience and background knowledge to inform their choices; they struggle to generate options and to imagine consequences; and, perhaps for good reason, they lack the self-confidence necessary to make reasoned judgments and stick by them.[10] In addition, their brain structure

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[8] "[A]dolescence is second only to the neonatal period in terms of both rapid biopsychosocial growth as well as changing environmental characteristics and demands. . . ." Spear, *supra* note 4, at 428; *see also id.* at 429 (stress is elevated in early adolescents; incidence of depression is often highest in adolescence; and teens experience sleep problems, great extremes in mood, and peak anxiety and self-consciousness).

[9] Compared to twelfth graders, seventh and eighth graders show deficiencies in imagining risks and future consequences. Catherine C. Lewis, *How Adolescents Approach Decisions*, 52 Child Dev. 538, 543 (1981); *see also* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psychol. 257, 271 (2001).

[10] B. Luna, *The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior* 249, 252-56 (F. Aboitiz & D. Cosmelli eds., 2009); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*,

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at this developmental stage hampers their ability to make the kind of judgments at 14 that they will comfortably handle at 17. Like a car with a powerful accelerator but weak brakes, a young teenager's brain is fully developed in the part responsible for emotional arousal and sensitivity to peer pressure (the gas pedal), but the parts in the frontal lobes that control impulses and allow long-term thinking, planning, and resistance to peer pressure (the brakes) are still developing.[11] At 13 and 14, the major transformation in brain structure that will result in a sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[12]

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18 Behav. Sci. & L. 741, 756 (2000); Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. Adolescence 265, 267-70 (1989); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 12 (1991).

[11] Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78, 83 (2008) [hereinafter Steinberg, *Social Neuroscience*]; Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions Psychol. Sci. 55, 56-58 (2007) [hereinafter Steinberg, *Risk Taking*].

[12] Luna, *supra* note 10, at 257; *see also* Thomas J. Whitford et al., *Brain Maturation in Adolescence*, 28 Human Brian Mapping 228, 228 (2007). At the core of this transformation are contemporaneous increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci. 77, 77-83 (2004). Myelination

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increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior; it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed facilitated by myelination facilitates cognitive complexity. Geier & Luna, *supra* note 4, at 216; *see also* Giedd, *supra*, at 80. White matter in the brain increases in a linear fashion, so that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. *Id.*

Cortical gray matter is thickest early in adolescence. *Id.* at 82. Later in the teenage years, this cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. *Id.*; *see also* Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults*, 9 Quinnipiac Health L.J. 1, 12 (2005); Spear, *supra* note 4, at 439.

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that process risk and control executive functioning do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: a Longitudinal MRI Study*, 2 Nature Neurosci. 861, 862 (1999); *see also* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999); Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function*, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). The "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into late adolescence." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 Am. Psychologist 1009, 1013 (2003); *see also* Elizabeth R. Sowell et al., *Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9

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Young adolescents find themselves behind the wheel of this fundamentally deficient vehicle with no driver's ed instruction to guide them. Their hunger for thrilling speed easily overwhelms their scant capacity to apprehend the possibility of a serious crash; they have weak brakes and very limited visibility ahead or behind. This is why no State permits young adolescents to drive. That older adolescents *are* issued driver's licenses reflects the fact that they are further along in development: – they have more experience in making decisions; their brain circuitry is more efficient; the hormonal storm of puberty is not brand-new to them; and they have a better view of their futures.[13] Sixteen- and seventeen-year-olds still are risky, bad drivers compared to adults,[14] but there is clear consensus that 14-year-olds are so lacking in maturity and decisionmaking capability that they should not even be allowed to take the wheel.

NeuroImage 587, 596 (1998); Halpern-Felsher & Cauffman, *supra* note 9, at 271.

[13] *See supra* notes 10, 12; Steinberg, *Social Neuroscience* at 86.

[14] Recognizing this fact, all States but one have enacted some sort of graduated licensing law, which "phases in unrestricted driving by allowing beginners to get their initial behind-the-wheel experiences under conditions that reduce the risk of collision." Christine Branche et al., *Graduated Licensing for Teens*, 30 J.L. Med. & Ethics 146, 146-47 (2002).

b. Young Adolescents Are Especially Susceptible to Risk-Taking Impulses and Negative Peer Influences.

Early teenagers' propensity for risk-taking exacerbates their decisionmaking difficulties. It is universally recognized that adolescence is characterized by risk-taking behavior; contemporary neurological science establishes that this is a function of physical brain development as well as a socially scripted phase of the passage from childhood to maturity.[15] For the purpose of understanding young adolescent behavior relative to that of adults, and even older teens, the critical observations are that (1) most adolescent risk-taking is a group phenomenon and (2) young adolescents are the most vulnerable to peer-group influence.

Parents, teachers, and observers of teenagers the world over know that social interactions and affiliations with peers take on out-sized importance in adolescence. Teens spend about one-third of waking hours talking with peers (but only 8% with adults).[16] While all adolescents are more peer-oriented than adults, the research indicates that vulnerability to peer pressure, especially for boys, increases during early

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[15] *E.g.*, Steinberg, *Risk Taking*, *supra* note 11, at 56-58; Geier & Luna, *supra* note 4, at 218; Ann E. Kelley et al., *Risk Taking and Novelty Seeking in Adolescence*, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004).

[16] Spear, *supra* note 4, at 420.

adolescence to an all-time high in eighth grade.[17] The need to fit in with the peer group – to impress peers with daredevil antics and smart-alecky comments – exerts enormous influence on the behavior of young adolescents, more so than during pre-adolescence or late adolescence.[18] Indeed, extreme vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[19]

Most teens grow out of this behavior as a part of the maturation process.[20] Typically, the ability to resist peer influence and to regulate internal impulses matures in middle or late adolescence.[21] Adolescents' capacity to extricate themselves from a group or other setting where they are likely to get into trouble also

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[17] Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 846, 848 (1986); Mann, *supra* note 10, at 267-68, 274; Steinberg, *Risk Taking*, *supra* note 11, at 57; N. Dickon Reppucci, *Adolescent Development and Juvenile Justice*, 27 Am. J. Community Psychol. 307, 318 (1999).

[18] Steinberg, *Social Neuroscience* at 92.

[19] Spear, *supra* note 4, at 421; Reppucci, *supra* note 17, at 319.

[20] Spear, *supra* note 4, at 421; Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 Law & Hum. Behav. 219, 229 (2002); Reppucci, *supra* note 17, at 319.

[21] Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why*, 1021 Annals N.Y. Acad. Sci. 51, 55 (2004).

increases with age. Denied the rights and privileges that accrue at age 18, all adolescents have less ability than adults to free themselves from morally toxic or dangerous environments. But the youngest teens are worst off. State and federal laws meant to protect young teens from exploitation and from their own underdeveloped sense of responsibility – including restrictions on driving, working, and leaving school – operate conversely to disable a 14-year-old from escaping an abusive parent, a dysfunctional or violent household, or a dangerous neighborhood.

c. Young Adolescents Have Not Yet Begun to Form Their Own Identities or to Imagine Their Futures.

Young teens, to a much greater extent than adults or even older teens, are handicapped by their inability to envision who they want to be or what they want to achieve in the future. Young teens are readily distinguishable from 15- and 16-year-olds by their excruciatingly low self-esteem and high self-consciousness, which fixate them on the instantaneous present.[22] Not until age 16 do adolescents obtain something close to a mature sense of perspective. And

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[22] Nurmi, *supra* note 10, at 12-13; *see also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence*, 20 Law & Hum. Behav. 249, 255 (1996); Seagrave & Grisso, *supra* note 20, at 229; Reppucci, *supra* note 17, at 318-19; Jeffrey Arnett, *Reckless Behavior in Adolescence*, 12 Dev. Rev. 339, 344 (1992); Steinberg, *Social Neuroscience* at 90.

not until the late teens or early twenties do they begin to form a coherent identity – although teens 16 and older do have a more mature sense of self than adolescents under 15.[23]

Very few young adolescents think about their future beyond age 30.[24] As adolescents grow older, they become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family. With this added perspective, their ability to plan and to realistically anticipate long-term consequences improves.[25] But at 13 and 14, middle-schoolers tend to struggle with planning even how to get tonight's homework done in time to watch their favorite television program.

The flip side of young adolescents' underdeveloped sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. A typical 14-year-old who acts irresponsibly in reaction to a thrilling impulse or peer pressure is not irretrievably depraved or permanently flawed. Nothing about his character is permanent, and he has years of development ahead, during which he can (and, in most cases, will) grow into a moral, law-abiding adult.[26]

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[23] Steinberg, *Social Neuroscience* at 94; Seagrave & Grisso, *supra* note 20, at 226, 229.

[24] Nurmi, *supra* note 10, at 27.

[25] *Id.* at 27-29.

[26] *See supra* note 21.

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
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> [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or not they are caught, arrested, prosecuted or sanctioned . . . .[27]

This Court has recognized that adolescents, as a class, lack the maturity, autonomy, and self-governing capacity of adults. *Roper*, 543 U.S. at 569-71; *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982). Within that class, which is defined by the transition from childhood to adulthood, there are gradations in capability that correlate with age. As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[28]

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[27] Steinberg, *supra* note 6, at 66.

[28] *See, e.g.*, Laurence Steinberg, Sandra Graham, et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 28, 39-40 (2009) [hereinafter Steinberg, Graham, et al., *Future Orientation*]; Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Dev. Psychol. 1531, 1540 (2007); Steinberg, Cauffman, et al., *supra* note 5, at 1775-76.

2. The Constitutional Significance of Young Adolescents' Limited Cognitive Capacity and Psychosocial Immaturity

Roper and *Graham* teach that the special vulnerabilities and frailties of adolescence bear directly on the Eighth Amendment calculus of personal culpability. *See supra* pp. 6-15. This is in accord with the scientific consensus and common-sense understanding of parents and teachers everywhere that a 14-year-old is not a 17-year-old and that neither is an adult. Young adolescents' culpability is diminished because they have not yet reached the level of cognitive and psychosocial development that permits adults to make mature decisions, forecast consequences, and control their impulses. The sensation-seeking proclivity and lack of impulse control characteristic of adolescents further support the conclusion that "their irresponsible conduct is not as morally reprehensible as that of an adult." *Roper*, 543 U.S. at 561.

Young adolescents in particular will *necessarily* change over time, either as a result of natural maturation or through the intervention worked by conviction and sentence. To pass a life-without-parole sentence on a young adolescent – a final, inflexible, reconsideration-resistant judgment that this still-incompletely-formed individual will *never* be fit to participate in civil society – is not merely premature but oblivious to "the duty of the government to respect the dignity of all persons," *Roper*, 543 U.S. at 560.

C. Hundreds of State and Federal Laws Recognize the Special Vulnerabilities and Deficiencies of Young Adolescents.

Roper and *Graham* do not stand alone in recognizing the special fragility of young adolescents and its implications for the degrees of responsibility and protection which they should be given – including protection from themselves. *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) ("[T]he common law has reflected the reality that children are not adults," and has erected safeguards to "'secure them from hurting themselves by their own improvident acts.'" (citation omitted)); *Eddings*, 455 U.S. at 115-16 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."); *Roper*, 543 U.S. at 581-88, Appendices B-D (collecting State laws on voting, jury service, and marriage without parental consent). Numerous State and federal laws provide special protections for early adolescents while, at the same time, limiting their freedoms, consistent with the understanding that young teens are not mature enough for a wide range of responsibilities and privileges – from the obvious and universal (driving,[29]

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[29] All States issue at least restricted driver's licenses to 16- or 17-year-olds. No State will issue even a learner's permit to a 13-year-old, and the vast majority will not issue a learner's permit to a 14-year-old. *See* App. A to Pet. Br., *Miller v. Alabama*, 10-9646 [hereinafter *Miller* App.].

marriage,[30] sex[31]) to the mundane or obscure (fireworks, hunting,[32] tattoos[33]). *See* App. A to Pet. Br., *Miller v. Alabama*, 10-9646 [hereinafter *Miller* App.], collecting State laws differentiating between younger and older adolescents. These ubiquitous regulations manifest the breadth of the consensus that the capacities and vulnerabilities of young adolescents differ substantially from those of adults and even of older teens.

1. State and Federal Law Recognizes That Young Adolescents Are Especially Vulnerable and Provides Heightened Protection from Exploitation and Abuse.

Reflecting the societal judgment that young teens are especially vulnerable to exploitation, abuse, and

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[30] Most States, while forbidding persons under 18 to marry without parental consent (*see Roper*, App. D), do allow 16- and 17-year-olds to marry *with* parental consent; but they deny that privilege to younger teens. *See Miller* App.

[31] All States differentiate between younger and older adolescents in regard to consent to sexual activity. A majority sets the minimum age of general consent at 16. Some States allow 13- or 14- or 15-year-olds to consent to sexual activity with other adolescents; but States generally do not allow a 14-year-old child to consent to sex with an adult. *See Miller* App.; Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 44 (1996).

[32] *See Miller* App.

[33] *See, e.g.*, Idaho Code Ann. § 18-1523; Cal. Penal Code § 653; Wis. Stat. Ann. §§ 948.01, 948.70; S.C. Code Ann. § 44-34-60.

persuasion, State and federal laws protect them by imposing enhanced criminal liability on older people who victimize them[34] and by obligating adults and older teens to safeguard young adolescents within their sphere of control.[35] Every State and the federal jurisdiction accords early adolescents enhanced protection from sex offenses:[36] most States provide that children

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[34] *See, e.g.*, Ala. Code § 13A-5-40(a)(15) (murder made capital where victim is 13 or younger); Ariz. Rev. Stat. Ann. § 13-751(F)(9) (victim 14 or younger); Ark. Code Ann. § 5-10-101(a)(9) (victim 14 or younger and defendant at least 18); Conn. Gen. Stat. Ann. § 53a-54b(8) (victim under 15 or younger); Del. Code Ann. tit. 11, § 4209(e)(1)(s) (victim 14 or younger and defendant at least 4 years older); 18 Pa. Cons. Stat. Ann. § 2901 (allowing conviction for kidnapping for taking of child under 14 without parental consent, even if child acquiesces); Wash. Rev. Code Ann. § 9A.40.010 (same for child 15 or younger); U.S. Sentencing Guidelines Manual § 2A2.3 (2011) ("Minor Assault") (adding 4 offense levels where victim younger than 16).

[35] *See, e.g.*, Ala. Code § 32-5-222 (operator of vehicle must require passengers 14 and younger to wear seat belts); Ark. Code Ann. § 5-65-111 (enhanced penalties for DUI with child 15 or younger in vehicle); Ariz. Rev. Stat. Ann. § 28-1383(A)(3) (same 14 or younger); *id.* § 28-909(B) (operator of vehicle must require passenger 15 or younger to wear seat belt); Mo. Ann. Stat. § 307.179(2) (same); Wash. Rev. Code Ann. § 46.61.688(4) (same); *see also, e.g.*, Ariz. Rev. Stat. Ann. § 13-3619 (misdemeanor to endanger life of minor under 16). *See generally Miller* App.

[36] *See, e.g.*, Ala. Code § 13A-6-67; Ga. Code Ann. § 16-6-3; 18 U.S.C. § 2241; *see also, e.g.*, Colo. Rev. Stat. Ann. § 18-1-503.5 (eliminating affirmative defense based on mistake of age where child 14 or younger).

under 16 are incapable of consenting to sexual activity[37] and, recognizing that young teens are particularly susceptible to negative influences, criminal statutes specifically prohibit the luring or enticing of young teens for the purpose of proposing illicit conduct.[38] The overwhelming majority of States acknowledge that appearing in court traumatizes young adolescents to such a degree that they require shielding when testifying against their abusers.[39]

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[37] *See supra* note 31. Many other States set the age of consent at 17, e.g., Mo. Ann. Stat. § 566.034, and even those that set the age of general consent at 18 typically provide stricter protections for children under 16. *Compare, e.g.*, Fla. Stat. Ann. § 800.04(4) (proscribing various types of sexual contact with children 12-15, without regard to age of defendant), *with id.* § 794.05 (proscribing a narrower range of sexual contact with children 16 and 17, unless emancipated, and only when defendant 24 or older).

[38] *See, e.g.*, Ala. Code § 13A-6-69; Ga. Code Ann. § 16-6-5; 720 Ill. Comp. Stat. Ann. 5/10-5.1; Neb. Rev. Stat. § 28-311; *see also Miller* App.

[39] *See, e.g.*, Ala. Code §§ 15-25-2, 15-25-3; Ariz. Rev. Stat. Ann. §§ 13-4251, 13-4253; Mo. Ann. Stat. § 491.075; *see also Miller* App.

2. State and Federal Law Recognizes That Early Adolescents Are Immature, Impulsive, and Relatively Irresponsible, as Well as That They Are Exceedingly Susceptible to Coercion, by Limiting Their Rights and Responsibilities in Many Aspects of Life.

The law seeks to protect young adolescents from exploitation and from their own lack of judgment in diverse contexts: education, employment, economic transactions, and so forth. Thirteen- and fourteen-year-olds universally are deemed too immature and irresponsible to drive, vote, serve on juries, drink alcohol, gamble, or marry even with parental consent. *See Miller* App. All States require children under 16 to attend school.[40] All States and the federal government limit the type and amount of work young teens can do[41] and most jurisdictions have adjudged early adolescents incapable of entering into contracts.[42]

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[40] Mark G. Yudof et al., *Education Policy and the Law* 1 (4th ed. 2002).

[41] *See, e.g.*, Mo. Ann. Stat. §§ 294.011, 294.021, 294.040 (forbidding most employment of children under 14 and limiting employment of 14 and 15 year olds); 43 Pa. Cons. Stat. Ann. §§ 42, 44 (limiting employment of 14- and 15-year-olds more strictly than 16- and 17-year-olds); 29 U.S.C. §§ 203(l), 212, 213(c) (regulating child labor and distinguishing between teens younger than 16 and teens 16 or 17 years old). *See also Miller* App.

[42] *See, e.g.*, Ala. Code § 27-14-5 (minors 15 and older can contract for certain kinds of insurance); Ariz. Rev. Stat. Ann. § 20-1106 (same); Colo. Rev. Stat. Ann. § 10-4-104 (same, 16 and

(Continued on following page)

As this Court has recognized, "the legal disqualifications placed on children as a class – e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent – exhibit the settled understanding that the differentiating characteristics of youth are universal." *J.D.B.*, 131 S. Ct. at 2403-04. Although jurisdictions draw lines for these protective and restrictive provisions at various points in early- to mid-adolescence, they universally bar 14-year-olds from activities that require maturity and responsible judgment. *See Miller* App. That these activities are permitted for many late adolescents demonstrates society's widespread recognition that early adolescents are developmentally distinct from adults and older teens – that 14-year-olds specifically lack the developmental capacity to bear such responsibilities, but that their incapacity will abate over the course of adolescence.

D. The Distinctive Characteristics of Young Adolescents Recognized in State, Federal, and Constitutional Law Undermine the Legitimacy and Utility of Life-Without-Parole Sentences for Young Teens.

Precisely the same reasoning that dictated this Court's decisions in *Roper* and *Graham* compels the

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older); Mich. Comp. Laws Ann. § 500.2205 (same); N.Y. Educ. Law § 281 (infants 16 and older cannot disaffirm education loans).

conclusion that a sentence of life imprisonment without parole imposed on a 14-year-old child for any offense violates the Eighth Amendment. As we have seen, the analysis of *Roper* and *Graham* centers on the disjunction between a punishment that declares an offender finally and forever unfit to exist in society and the uniquely transitory characteristics of youth that preclude any such declaration. *Roper* and *Graham* identify those characteristics, the kinds of scientific and legal sources from which additional information about them can be obtained, and the ways in which that information bears upon the Eighth Amendment's guiding principles. When the constitutional methodology of *Roper* and *Graham* is applied to the signature characteristics of young adolescents spelled out in the preceding pages of this brief, a firm basis emerges for the finding that a child of 14 – even one convicted of murder – cannot legitimately be consigned to lifelong incarceration with no possibility of ever being redeemed and ready for release on parole.

1. Some of These Characteristics Bear Directly on the Degree of Culpability That Can Be Found to Attach to Adolescent Criminal Behavior.

Children of 13 and 14 are especially vulnerable to each of the frailties and limitations that *Roper* and *Graham* regarded as relevant to culpability. They are neurologically, hormonally, and emotionally hardwired for sensation-seeking, impulsivity, poor foresight, worse judgment, and control failure. They are

uniquely sensitive to peer pressure and bad external influences. They did not and cannot choose the conditions of upbringing that make them what they are, and the very protective laws that recognize their incapacities have the correlative effect of limiting their ability to escape from those conditions. Their existence is dominated by the "struggle to define their identity," *Roper*, 543 U.S. at 570, which they are not yet equipped to win. *Graham* reaffirmed *Roper*'s conclusion that, even for older teens, "'the case for retribution is not as strong with a minor as with an adult.'" *Graham*, 130 S. Ct. at 2028 (citation omitted). And it is still more true of younger teens that their "culpability or blameworthiness is diminished, to a sustantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

2. Some of These Characteristics Bear on the Inutility of Life Without Parole as a Deterrent.

Roper and *Graham* both explained that the "'same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.'" *Graham*, 130 S. Ct. at 2028 (citation omitted). Because "adolescents are less oriented to the future than are adults,"[43] far-future consequences are less meaningful to them; it is

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[43] Steinberg, Graham, et al., *Future Orientation supra* note 28, at 39.

particularly difficult to imagine them planning their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Testing of individuals from 10 to 30 years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals."[44] Thus, young adolescents are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 130 S. Ct. at 2028-29.

3. Some of These Characteristics Bear on the Risks of Wrongful Conviction (Or Degree of Conviction) and on the Even More Serious Risks of Erroneous Judgment Regarding Appropriate Sentence.

Graham recognized that "even if we were to assume that some juvenile nonhomicide offenders might have 'sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,' . . . to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." 130 S. Ct. at 2032. We have argued above that this predictive difficulty is one of the considerations that make life-without-parole sentences inherently unsuitable for young adolescents. It also means that if such sentences are

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[44] *Id.* at 36.

permitted, there is a significant risk that they will be imposed on the wrong adolescents.

As *Graham* found, "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." 130 S. Ct. at 2032. The disadvantage is greatest in the case of young adolescents because this age group tends to be the most cognitively and psychosocially impaired in ways that undermine the fairness and reliability of criminal proceedings against them. These impairments not only enhance the risk of erroneous sentencing decisions; they also enhance the risk of erroneous convictions. "Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it." *Id.* "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense" and "are likely to impair the quality of a juvenile defendant's representation." *Id.*

In adult criminal proceedings, critical decisions – such as whether to accept a plea agreement, waive a jury trial, or testify – must be made by the defendant. Model Rules of Prof'l Conduct R. 1.2(a). The empirical evidence raises doubts about the capacity of a significant number of 14-year-olds to make these

decisions.[45] And unsurprisingly, young adolescents are particularly susceptible to giving false confessions. Of young adolescents who have been exonerated in the United States, 69% had confessed falsely, as compared to 8% of adults and 25% of older teens.[46] Because young adolescents more readily perceive short-term benefits than hard-to-imagine future outcomes, they tend to give inculpatory statements in order to be allowed to go home.[47] Young adolescents are quick to comply with the wishes of authority figures, making them highly susceptible to police suggestions and pressure.[48]

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[45] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 356-57 (2003); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 14 (1997).

[46] Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (table 4) (2005); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004); Allison S. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 Law & Hum. Behav. 141, 148 (2003).

[47] Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 Law & Psychol. Rev. 53, 65-66 (2007).

[48] Redlich & Goodman, *supra* note 46, at 150-52.

4. The Severe, Terminal Sanction of Life Without Parole Is Inappropriate for Young Adolescents Because the Retributive, Deterrent, and Incapacitative Virtues of Such a Punishment Are Attenuated in Their Cases.

Graham recognized that "[l]ife without parole is an especially harsh punishment for a juvenile." 130 S. Ct. at 2028. In their absolute condemnation of the remainder of a child's life, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* at 2027. A sentence to lifelong incarceration "alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration." *Id.*

For adolescents sentenced to life without parole, this permanent judgment is issued before their adult lives have even begun, before they have ever had the most basic freedoms to shape their own destiny. "Under this sentence, a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 2028. For this reason, "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* As this Court has found, a life without parole sentence imposed on a child "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in

prison for the rest of his days.'" *Id.* at 2027 (citation omitted).

Life without parole was enacted "to deal with dangerous and incorrigible individuals who would be a constant threat to society." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968). As *Graham* recognized, there is no sound basis for finding incorrigibility in the case of an as-yet-undeveloped young teen. 130 S. Ct. at 2029. Plainly put, "incorrigibility is inconsistent with youth." *Id.* (quoting *Workman*, 429 S.W.2d at 378).[49] This is especially so in the case of young adolescents who still have so far to go toward their "potential to attain a mature understanding of . . . [their] own humanity," *Roper*, 543 U.S. at 554.

E. Objective Indicia Demonstrate That There Is a Consensus Against Imposing Sentences of Life Imprisonment Without Parole Upon Young Adolescents.

In gauging the acceptance or rejection of a particular criminal punishment by contemporary society, the Court looks to both legislative enactments and actual usage. *Graham*, 130 S. Ct. at 2023; *Roper*, 543

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[49] Life without parole is not necessary to serve the penological goal of incapacitation. Life *with* possibility of parole would permit review and evaluation of an offender, as an adult, to determine whether dangerousness or incorrigibility should preclude his or her release – a determination that cannot reliably or accurately be made at sentencing, when a child's character has not yet formed.

U.S. at 564-67. *Graham* noted that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus" (130 S. Ct. at 2023) and relied on the fact that "[n]ationwide, there are 123 juvenile nonhomicide offenders serving life without parole sentences" and that "only 11 jurisdictions nationwide in fact impose . . . [such] sentences" to conclude that "[t]he sentencing practice now under consideration is exceedingly rare." *Id.* at 2025-26.

Roper based its finding of "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal'" (543 U.S. at 567 (citation omitted)) partly on the observation that "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. . . . [In the past 16 years], six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so." *Id.* at 564-65. This analysis tracked that in *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), where this Court had "emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent"; from 1989 to 2002, "only five States had executed offenders known to have an IQ under 70." *Roper*, 543 U.S. at 564.

The touchstone of actual use makes particularly good sense in the context of life-without-parole sentences for young adolescents because the statutory authorizations for these sentences are largely the result of the unplanned interplay of two independent

legislative developments: (i) the expansion of life-without-parole sentences for adult crimes; and (ii) modifications of juvenile-court jurisdiction that bring a larger number of adolescents into adult court. These developments cannot be read as expressing any legislative judgment on the specific issue of the appropriateness of life without parole for adolescents.

1. Life Without Parole for Young Adolescents Is an Unconsidered Consequence of Two Distinct Legislative Developments.

In the last few decades, politically popular "tough on crime" policies like "truth in sentencing" have greatly circumscribed parole, resulting in a dramatic increase in the availability of life-without-parole sentences *for adults*.[50] Simultaneously with the trend to stiffen penalties for adult offenders by expanding life without parole, many States responded to concerns about the perceived inadequacy of the juvenile justice system to deal with violent youth crime. They did this principally by lowering the age at which children could be prosecuted in adult court.[51] These changes in inter-court jurisdictional boundaries or in transfer provisions represented an abandonment of

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[50] *See* Marc Mauer et al., *The Meaning of "Life": Long Prison Sentences in Context* 1, 5-8, 12 (2004), http://sentencingproject.org/Admin/Documents/publications/inc_meaningoflife.pdf.

[51] *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice: A Century of Change* 4-5 (1999), http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf.

the previously prevailing regimes that were commonly understood to limit juvenile-court dispositions to detention in a juvenile facility until age 18 or 21 at a maximum.[32] But there is no evidence of any significant legislative consideration of the specific question whether lifelong imprisonment without parole is appropriate for young adolescents. For the most part, life-without-parole sentencing for young adolescents became technically possible as an adventitious consequence of the overlay of two distinct movements, neither directed to the question.

Graham recognized that "the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences." 130 S. Ct. at 2025. This is so because such statutes reveal at most the age at which States have determined a child is "'old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.*'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 829 n.24 (1988) (plurality opinion) with *Thompson*'s emphasis); *accord Thompson*, 487 U.S. at

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[32] *See, e.g.*, Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 San Diego L. Rev. 783-86, 792 (2000).

850-51 (O'Connor, J., concurring). *Graham* and *Thompson* teach that legislative judgments about the appropriate penalty for a child offender cannot be inferred from a statute that simply regulates the boundary between juvenile-court and adult-court jurisdictions.

2. Virtually Every State That Has Expressly Addressed the Question of the Minimum Age of Eligibility for a Life-Without-Parole Sentence Has Set the Age Above 14.

Where States have expressly addressed the minimum age at which life imprisonment without parole may be imposed, they have all but unanimously set that age above 14. *See, e.g.*, La. Child. Code Ann. art. 857(B) ("Notwithstanding any other provision of law to the contrary, a fourteen-year-old who is transferred pursuant to this Article and subsequently convicted shall not be confined for such conviction beyond his thirty-first birthday."); Colo. Rev. Stat. Ann. § 17-22.5-104(2)(d)(IV) (minimum age for life without parole is 18); Cal. Penal Code § 190.5(b) (minimum age for life without parole for first-degree murder is 16);[54] Ind. Code Ann. § 35-50-2-3(b)(2) (minimum age

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[53] The California Court of Appeal has invalidated a code provision permitting a juvenile kidnapper under age 16 to be sentenced to life without parole, Cal. Penal Code § 209(a), as violating the federal and California Constitutions. *In re Nuñez*, 93 Cal. Rptr. 3d 242, 258-59 (Cal. Ct. App. 2009).

for life without parole for murder is 16); D.C. Code § 22-2104 (minimum age for life without parole for murder is 18); Kan. Stat. Ann. § 21-6618 (minimum age for life without parole for capital murder is 18); Ky. Rev. Stat. Ann. § 640.040 (minimum age for life without parole for murder is 18); Mont. Code Ann. § 46-18-222 (exempting all children under 18 from restrictions on parole eligibility); Or. Rev. Stat. Ann. § 161.620 (prohibiting life without parole for children under 18 waived from juvenile court); Tex. Penal Code Ann. § 12.31(a)(1), (b)(1) (prohibiting life without parole for children under 17 waived from juvenile court). The outlier, Massachusetts, sets the minimum age at 14 (for life without parole for murder). Mass. Gen. Laws Ann. ch. 119, § 72B.[54]

The near-complete absence of express legislative approval of such a sentence for 13- and 14-year-olds reflects a consensus that the sentence would be excessively harsh punishment as applied to a young adolescent.

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[54] Some death-penalty States explicitly abolished the death penalty for juveniles by provisions that arguably authorize life without parole. *See, e.g.*, 730 Ill. Comp. Stat. Ann. 5/5-8-1; Md. Code Ann. Crim. Law § 2-202(b)(2); Nev. Rev. Stat. Ann. § 176.025 (amended by 2011 Nev. Stat. Ch. 12 to comply with *Graham*); N.C. Gen. Stat. Ann. § 14-17; Ohio Rev. Code Ann. § 2929.03(E); Va. Code Ann. § 18.2-10(a); *cf.* Mo. Ann. Stat. § 565.020 (amended 1990).

3. In Actual Practice, the Imposition of a Life-Without-Parole Sentence on a Young Teenager Is an Aberrant, Exceedingly Rare Occurrence.

Although not explicitly addressing the issue of the propriety of life-without-parole sentences for the youngest teens, statutes in 26 States have the effect of exposing 13-year-olds to such a sentence;[55] and statutes in an additional 13 States make the sentence possible for 14-year-olds.[56] In the light of this broad theoretical availability, the infrequency with which 13- and 14-year-olds are actually sentenced to life without parole is striking. It evidences nationwide repudiation, not acceptance, of the sentence for children of these young ages.

There are only about 79 persons in the United States under life-without-parole sentences for offenses committed at age 13 or 14.[57] This number is

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[55] *See infra* Appendix A.

[56] *See infra* Appendix B.

[57] J.A. 19, 21; Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20 (2007) [hereinafter *Cruel and Unusual*] (reporting results of a nationwide study identifying 73 children serving life-without-parole sentences for offenses at age 13 or 14). Since the publication of this report, there has been some fluctuation in the number: some children originally identified have obtained relief from their convictions or sentences (including some under this Court's decision in *Graham*), and some new sentences have also been imposed. Counsel's extensive research sets the current total number of 13- and 14-year-old children serving sentences of life without parole at 79 plus or minus one or two.

especially indicative of nationwide repudiation when one considers that 79 represents the total *accumulation* of life-without-parole sentences imposed on 13- and 14-year-olds "stretching back many years" because "a juvenile sentenced to life without parole is likely to live in prison for decades." *Graham*, 130 S. Ct. at 2024. An accumulation of approximately 79 life-without-parole sentences since 1971[58] in a nation whose population rose from 200,000,000 to more than to 311,000,000 during those 40 years is a singularly unimpressive showing of institutional or public acceptance.

The number 79 bears comparison with the parallel figures for the classes involved in *Graham* and *Roper*. When *Graham* found a national consensus against life-without-parole sentences for children convicted of nonhomicides, there were 123 individuals serving such sentences. 130 S. Ct. at 2024. When *Roper* recognized a national consensus against death sentences for juveniles, 71 juvenile offenders were under that sentence.[59]

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[58] The earliest sentence imposed upon a 14-year-old juvenile currently serving life-without-parole was Brian Wilson's, dating from 1971. *See Commonwealth v. Wallace*, 500 A.2d 816 (Pa. Super. Ct. 1985).

[59] Victor L. Streib, *Death Sentences and Executions for Juvenile Crimes, January 1, 1973-February 28, 2005* 3 (Oct. 2005), http://www.law.onu.edu/faculty_staff/faculty_profiles/coursematerials/streib/juvdeath.pdf.

The vast majority of jurisdictions nationwide – 32 States, the District of Columbia, and the federal government – have not sentenced a single child of either 13 or 14 to life imprisonment without parole. Only 18 States have 13- or 14-year-old offenders serving life-without-parole sentences.[60] Most of these jurisdictions that have imposed life-without-parole sentences on young adolescents have done so rarely: Only six States have more than two or three children serving such sentences.[61]

Even this smattering of sentences can hardly be said to represent reasoned judgments that lifetime imprisonment without parole was necessary or appropriate for the individual juveniles involved. Ninety percent of these sentences were – like Kuntrell's sentence – imposed under mandatory sentencing statutes that prevented the sentencer from considering these childrens' young ages or other mitigating circumstances.[62] They do not reflect focused, factually

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[60] *See Cruel and Unusual* at 20 (juveniles 14 or younger serving life without parole in 19 States: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Illinois, Iowa, Michigan, Missouri, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin). The current number is 18 States because California now has no people serving life without parole for offenses committed at 14 or younger. *See Nuñez*, 93 Cal. Rptr. 3d at 259, cited *supra* note 53.

[61] *Cruel and Unusual* at 20.

[62] Only eight of the approximately 79 sentences were imposed under discretionary sentencing schemes: two in Arkansas for first degree murder; one in Arizona for first degree murder;

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informed efforts to attune punishment to juvenile offenders' particular degree of culpability, but rather automatic applications of statutory schemes which – as we have noted at pages 41-45 *supra* – themselves bear no assurance of such an effort by Legislatures. And where sentencers *are* accorded discretion to impose or withhold life-without-parole sentences for young teens, such sentences are exceedingly rare: – fewer than a dozen nationwide. Another measure of the level and nature of public toleration of such sentences is the race of the people who get them. Of the approximately 79 people nationwide serving life-without-parole sentences for offenses committed at ages 13 or 14, 70% are racial minorities.[63]

The determination that life without parole is an excessive punishment for adolescent offenders is further confirmed by "the global consensus against the sentencing practice in question." *Graham*, 130 S. Ct. at 2033; *see also Roper*, 543 U.S. at 575 (consensus against sentence "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction" to this punishment). The United States stands alone in sentencing children to die in prison without hope of ever winning release.[64] No other country is

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two in Florida for attempted first degree and second degree murder; one in Illinois for first degree murder; one in Tennessee for first degree murder; and one in Wisconsin for first degree intentional homicide.

[63] *Cruel and Unusual* at 20.

[64] *Graham*, 130 S. Ct. at 2034.

known to have any offenders serving life-without-parole sentences for crimes as children.[65] Sentencing juveniles to life without parole is banned by international conventions signed by almost every member of the world community of nations. As *Graham* noted, "the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the 'imposition of life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age,'" 130 S. Ct. at 2034; and the United States was alone in opposing a resolution in the United Nations General Assembly calling on all states to abolish life sentences without parole for juveniles. The motion passed by a vote of 176 to 1.[66]

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[65] *See* Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 990 (2008).

[66] G.A. Res. 61/146, ¶ 31(a), UN Doc. No. A/Res/61/146 (Dec. 19, 2006). The United States has been found to be in potential violation of two treaties to which it *is* a signatory – the International Covenant on Civil and Political Rights and the Convention Against Torture, Inhumane or Degrading Treatment or Punishment – due to its imposition of life imprisonment without parole on children. U.N. Human Rights Committee, 87th Sess., Concluding Observations on the United States of America, ¶ 34, U.N. Doc. CCCPR/C/SR.2395 (Dec. 18, 2006); U.N. Committee Against Torture, 36th Sess., Conclusions and Recommendations on the United States of America, ¶ 34, U.N. Doc. No. CAT/C/USA/CO/2 (July 25, 2006).

When the actual practice of imposing life-without-parole sentences on young adolescents is examined, it amounts to a powerful demonstration of domestic and global unacceptability. Most jurisdictions in this Nation have had a chance to use life without parole extensively in the sentencing of adolescents but have voted with their feet against this form of punishment. It is shunned world-wide. What emerges is a solid consensus that the passing of irrevocable judgment on a child of 14, condemning him or her to be imprisoned until death, is an intolerable aberration.

F. There Is No Legal, Empirical, or Practical Justification for Disregarding in Homicide Cases the Findings of *Roper* and *Graham* That Salient Differences Between Young Teens and Adults Bear Directly on the Question of Culpability Central to the Eighth Amendment Excessiveness Analysis.

1. Young Teens Convicted of Homicide Are Indistinguishable from Those Convicted of Nonhomicide Offenses Under This Court's Reasoning in *Roper* and *Graham*.

None of the analytical considerations identified in *Roper* and *Graham* can rationally countenance a distinction between homicide and nonhomicide crimes. It cannot be said that children who commit homicides have any less "[d]ifficulty in weighing long-term consequences" (*Graham*, 130 S. Ct. at 2032) or that they are any less likely to make "impetuous and

ill-considered actions and decisions" (*id.* at 2028) than those who commit nonhomicides. Nor are the "parts of the brain involved in behavior control" (*id.* at 2026) more mature in the case of a child who commits a homicide. Children involved in homicides do not have more "control, or experience with control, over their own environment" than other children, and they are no less "vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569.

The character of a child who commits homicide is no less "transitory" (*id.* at 570) and no more "well formed" (*Graham*, 130 S. Ct. at 2026) than that of a juvenile nonhomicide offender. "The reality that juveniles still struggle to define their identity means it is less supportable [than in the case of an adult] to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. And it is no less challenging in homicide cases than in cases of other violent crimes to accurately "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Graham*, 130 S. Ct. at 2032.

Roper recognized that juveniles as a class differ from adults in every one of these dimensions, even in the case of aggravated homicides. And for young adolescents like Kuntrell, the class-wide differences from adults in capability and culpability are even greater. Regarding this subclass of younger teens, the infrequency with which they have been sentenced to life without parole during recent decades of "[a]ctual

sentencing practices" (*Graham*, 130 S. Ct. at 2023) is as striking as that in *Graham* and *Roper*.

2. The "Super-Predator" Is An Exploded Myth That Cannot Justify Sentencing Young Teens to Life Without Parole.

Homicides by young adolescents do not constitute a danger of such magnitude as to warrant their exclusion from the constitutional logic of *Roper* and *Graham*. Although the 79 children 14 and younger who have been sentenced to life without parole for homicides represent only a minuscule percentage of children that age arrested for homicides, the total number of young adolescents arrested for homicide also represents only a tiny fraction of the total number of homicide arrests every year.[67]

In the 1990s, fears of a massive increase in violent juvenile crime stimulated many of the legal changes that removed young adolescents from juvenile courts and exposed them to sentences of life without parole. Some influential criminologists issued predictions of a coming wave of "super-predators" with whom the juvenile justice system would be

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[67] For example, in 2010 the Uniform Crime Reports indicate that out of 8667 people arrested for murder or non-negligent homicide, only 73 (0.8%) were 14 or younger. *See* U.S. Dep't of Justice, Fed. Bureau of Investigation, Uniform Crime Reports for the United States, Table 38 (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2010/crime-in-the-u.s.-2010/tables/10tbl38.xls.

unable to cope.[68] These theorists suggested that we would soon see "elementary school youngsters who pack guns instead of lunches" and who "have absolutely no respect for human life."[69] Panic over the impending crime wave expected from these "radically impulsive, brutally remorseless"[70] children led nearly every State to enact legislation increasing the exposure of children to adult prosecution.[71]

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[68] "Super-predator" language was commonly used in conjunction with dire predictions that a vast increase in violent juvenile crime was occurring or about to occur. *See, e.g.*, Sacha Coupet, *What to Do With the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. Pa. L. Rev. 1303, 1307 (2000); Laura A. Bazelon, *Note: Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. Rev. 159 (2000). Much of the frightening imagery was racially coded. *See, e.g.*, John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, City Journal (1996), http://www.city-journal.org/html/6_2_my_black.html (warning about "270,000 more young predators on the streets than in 1990, coming at us in waves over the next two decades . . . as many as half of these juvenile super-predators could be young black males"); William J. Bennett, John J. DiIulio, Jr., & John P. Walters, *Body Count: Moral Poverty – And How to Win America's War Against Crime and Drugs* 27-28 (1996) [hereinafter *Body Count*].

[69] John J. DiIulio, Jr., *The Coming of the Super-Predators*, Wkly. Standard, Nov. 27, 1995, at 23.

[70] Bennett, *supra* note 68, at 27.

[71] *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice: A Century of Change* 4-5 (1999), http://www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf.

In the last decade, those predictions have proved wildly inaccurate.[72] Lower rates of juvenile crime from 1994 to 2000 despite simultaneous increases in the juvenile population led academics who had originally supported the "super-predator" theory to back away from their predictions.[73] In 2001, the Surgeon General of the United States released a report labeling the "super-predator" theory a myth and stating that "[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years."[74]

Even during the height of the violent crime wave of the early 1990s, when homicide arrests did temporarily increase for older teens and young adults, homicides by children 14 and younger remained a

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[72] *See* Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L. Rev. 727, 728 (1998).

[73] *See, e.g.*, Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19.

[74] U.S. Surgeon General, *Youth Violence: A Report of the Surgeon General*, Chapter 1: Myths About Youth Violence (2001), http://www.surgeongeneral.gov/library/youthviolence/chapter1/sec2.html#myths; *see also* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Challenging the Myths*, at 5 (2001), http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (finding that "analysis of juvenile homicide arrests also leads to the conclusion that juvenile superpredators are more myth than reality").

very small part of the problem.[75] Thus, there is no pragmatic justification for abandoning or cutting back all of the teachings of *Roper* and *Graham* in order to make constitutional space for lifelong incarceration of a few 14-year-olds convicted of murder.

3. Principled, Practical Procedures Are Available to Assure Against Improvident Release of Young Teens Imprisoned for Homicide.

Graham forbids juvenile sentences that provide "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." 130 S. Ct. at 2032. Its aim is to secure for children "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030.

Many States have procedures suitable for providing a "meaningful opportunity to obtain release" by encouraging incarcerated children to work "to achieve maturity of judgment." *Id.* at 2032. Alabama begins considering release for parole-eligible life-term

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[75] The 1992 UCR figures, for example, show 19,491 people arrested for murder or non-negligent homicide, but only 304 (1.6%) who were 14 or younger. *See* U.S. Dep't of Justice, Fed. Bureau of Investigation, Uniform Crime Reports for the United States, at 227 (1992); *see also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends 1980-2008*, 4 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf (showing trends in homicide arrests by age from 1980 to 2008).

inmates after 15 years and subsequently conducts periodic review of prisoners not yet deemed ready to return to society. *See* Ala. Board of Pardons and Paroles, Rules, Regulations, and Procedures, Art. 1(8). Louisiana requires that any 14-year-old tried as an adult be released by age 31. *See* La. Child. Code Ann. art. 857(B). Provisions of this sort balance the need for punishment with the need to provide hope and incentive for improvement.

They also respect *Graham*'s and *Roper*'s recognition of the salient characteristics of youth, particularly children's innate "capacity for change," *Graham*, 130 S. Ct. at 2030. They respect *Graham*'s insight that "[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." *Id.* at 2032. They can be used to assure an opportunity for release which is not so far beyond the time horizon of a teen that it fails to provide an incentive for reform or so close to death that it denies a reformed teen the chance to contribute to the society to which he or she returns. They refute the bleak, destructive, self-fulfilling prophesy that "the system itself . . . [must become] complicit in the lack of development" of incarcerated children by "withhold[ing] counseling, education, and rehabilitation programs" (*id.* at 2032-33) that can foster "self-recognition of human worth and potential" (*id.* at 2032).

"A State is not required to guarantee eventual freedom to a juvenile offender." *Id.* at 2030. For young teens convicted of homicide, no less than for

those convicted of lesser crimes, the States can keep the promise of *Graham* through any sentencing or post-sentence review procedure that provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *id.*

G. Appropriate Categorical Lines Can Readily Be Drawn.

Roper and *Graham* both recognized that, given the "dilemma of juvenile sentencing," *Graham*, 130 S. Ct. at 2032, a categorical rule, while "imperfect," was necessary. *Id.* at 2030; *Roper*, 543 U.S. at 572. "[A]llowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved" is "insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." *Graham*, 130 S. Ct. at 2031. And "even if we were to assume that some juvenile nonhomicide offenders might have 'sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,' . . . to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id.* at 2032

(citation omitted).[76] Given the inescapable difficulty of reliably predicting a child's character development years into the future,[77] a categorical rule barring the infliction of a life-without-parole sentence on any offender under a certain age is necessary. The question is not whether to draw a category boundary but where to draw it.[78]

This is, of course, familiar terrain for the Court. "The case-by-case approach to sentencing must . . . be confined by some boundaries." *Graham*, 130 S. Ct. at 2031-32. A well-established process for locating the boundary line through consideration of "objective indicia of society's standards," *Graham*, 130 S. Ct. at 2022, and "the exercise of [the Court's] own independent judgment," *id.*, is fully adequate to the task.

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[76] In homicide cases particularly, an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" should require consideration. *Roper*, 543 U.S. at 573.

[77] "[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Graham*, 130 S. Ct. at 2032. "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . all can lead to poor decisions by one charged with a juvenile offense." *Id.* These problems heighten the risk that, under a case-by-case approach, a court or jury will misjudge a particular child's culpability and amenability to reform.

[78] Despite "the objections always raised against categorical rules . . . , a line must be drawn." *Roper*, 543 U.S. at 574.

The Court could discern a satisfactory basis for drawing the line at any one of several different ages. To a considerable extent, the vulnerabilities and limitations of adolescence are common to a 14-year-old like Kuntrell Jackson and to a 17-year-old. For that reason, and because of the widespread recognition that full adult responsibilities requiring maturity of judgment should be withheld from adolescents below the age of 18 (*see, e.g.*, *Roper*, 543 U.S. at 579, Appendices B-D), the line could properly be drawn at 18.

However, as the scientific data we have summarized at pages 16-27 *supra* and the common-sense observations of parents world-wide attest, 13- and 14-year-olds as a class are much less mature than 17-year-olds.[79] Numerous State statutes recognize this plain fact of life by providing special protections for children of 13 and 14 and by restricting their freedoms in ways that are thought unnecessary in the case of older teenagers. *See supra* pp. 29-34. An additional – indeed, independently sufficient – basis for drawing the line between 14 and 15 would be the indisputable numerical evidence of repudiation of sentences of life imprisonment without the possibility of parole for 13- and 14-year-olds: a nationwide total of only approximately 79 such sentences having accumulated over the past 40 years. *See supra* pp. 47-50.

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[79] *See, e.g.*, Steinberg, Graham, et al., *Future Orientation*, *supra* note 28, at 39; Steinberg & Monahan, *supra* note 28, at 1538-41; Steinberg, Cauffman, et al., *supra* note 5, at 1776.

While we do not have access to precise data regarding the comparable figure for older adolescents, the available indications are that the numbers rise sharply from age 15 upwards.[80]

There is also justification for drawing the line between 15 and 16. Many State statutes group 15-year-olds with 13- and 14-year-olds for purposes of the special protections and restrictions that they prescribe for younger teens but not older ones. And in the ordinary course of adolescent development, the growth of some capabilities that are crucial for mature judgment appears to level off at 16. *See, e.g.*, Laurence Steinberg, Elizabeth Cauffman, et al., *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psychol. 1764, 1771 (2008) ("[S]ensation seeking increases during the first half of adolescence and then declines steadily from age 16 on."); *id.* at 1774 ("[H]eightened sensation seeking is most clearly and consistently seen among individuals between the ages of 12 and 15."); Laurence

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[80] As of 2008, Human Rights Watch estimated there were 2484 offenders serving juvenile life-without-parole sentences in the United States. Human Rights Watch, *The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008* (May 2008), http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf. Human Rights Watch previously estimated that 13.3% of these children were 15 years old at the time of their offense. *See* Amnesty Int'l & Human Rights Watch, *Rest of Their Lives: Life without Parole for Youth Offenders in the United States* 26 (Oct. 11, 2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives.

Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55 (2009).

But wherever the line is drawn, there is no defensible constitutional logic consistent with *Roper* and *Graham* that allows a State to condemn a 14-year-old child to "die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes," *Graham*, 130 S. Ct. at 2033.

H. The Constitutional Rule of *Graham* Would Be Stripped of Intelligible Meaning If It Were Held Inapplicable to the Mandatory Life-Without-Parole Sentence Imposed on 14-Year-Old Kuntrell Jackson for a Homicide Crime Attributed to Him Through Accessorial Felony-Murder Doctrines.

As the dissent below found, it is difficult to distinguish Kuntrell Jackson's level of personal culpability from Terrance Graham's. J.A. 85 ("The facts in *Graham* are not terribly different from the facts in the instant case, except that the victim in *Graham* did not die from Graham's accomplice's physical attack."). Both young men engaged in a robbery with other teens, and, in both cases, an accomplice attacked the robbery victim. J.A. 84-86. Indeed, if case-specific distinctions were to be drawn, convincing reasons could be found to regard Kuntrell Jackson's

culpability as less than Terrance Graham's. Kuntrell was barely 14 years old; he became aware of an older companion's possession of a gun only shortly before his companions entered the shop where the robbery was committed; he himself initially chose to remain outside the shop (*Jackson*, 194 S.W.3d at 758-59); and the circumstances strongly suggest that his companion's firing of the gun was unexpected: the startled trio ran away without taking any money; Kuntrell's felony-murder conviction was not obtained on the theory that he intended any assault upon the victim;[51] and the conviction was affirmed on the express ground that the evidence was not insufficient solely because the jury could have resolved the "question of fact as to whether Jackson said 'We ain't playin'' or 'I thought you all was playin'' upon entering the store" (*id.* at 760) in such a way as to support a conclusion that "Jackson did, in fact, in some way solicit, command, induce, procure, counsel, or aid in the commission of the crime *sub judice*" (*id.*).

Graham observed that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." 130 S. Ct. at 2027. To be sure, from the standpoint of the harm caused, even unintended

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[51] "In order to convict the appellant of capital murder, the State had to prove that Jackson attempted to commit or committed an aggravated robbery and, in the course of that offense, he, or an accomplice, caused Ms. Troup's death under circumstance manifesting an extreme indifference to the value of human life." 194 S.W.3d at 760 (emphasis added).

felony murder is a more serious crime than the nonhomicide offenses on which it is predicated. This is undeniable and explains why it is traditionally and legitimately punished more severely. But the application of felony-murder liability to young children becomes problematic in the light of the differences between children and adults recognized in *Roper* and *Graham*.

The felony-murder doctrine rests essentially on the idea that one who chooses to become involved in a potentially violent felony should reasonably anticipate injury to victims or bystanders. *See Tison v. Arizona*, 481 U.S. 137, 159-60 (1987) (Brennan, J., dissenting). As *Graham* implicitly recognizes, this rationale is attenuated in the case of juveniles. Juveniles as a group, and especially young adolescents like Kuntrell, have a significantly impaired ability to anticipate future consequences.[82] For this reason, they are less able to recognize that their participation in a robbery may lead to someone's injury or death. Moreover, juveniles' poor impulse control and high susceptibility to peer influence inhibit their ability to withdraw from potentially deadly situations when they are encouraged into wrongdoing by others. *See Graham*, 130 S. Ct. at 2026. In short, Kuntrell's incarceration for life with no possibility of parole cannot be reconciled with *Graham*'s square holding through

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[82] See the authorities in note 22 *supra*.

any logic that takes this Court's reasoning in *Graham* and *Roper* at all seriously.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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January 9, 2012

APPENDIX A

States in Which Children 13 and Older Are Exposed to a Sentence of Life Without Parole

Delaware:	Del. Code Ann. tit. 10, § 1010; *id.* tit. 11, § 4209 (amended in non-pertinent part by 2011 Del. Legis. Ch. 179 H.B. 214, approved Aug. 17, 2011)
Florida:	Fla. Stat. Ann. §§ 775.082, 985.557, 985.56(1)
Georgia:	Ga. Code Ann. §§ 16-3-1, 16-5-1(d), 15-11-28(b)
Hawaii:	Haw. Rev. Stat. §§ 571-22, 706-656(1)
Idaho:	Idaho Code Ann. §§ 18-4004, 20-509(1)
Illinois:	705 Ill. Comp. Stat. Ann. 405/5-130, 730 Ill. Comp. Stat. Ann. 5/5-8-1(a)(1)
Maine:	Me. Rev. Stat. Ann. tit. 15, § 3101; *id.* tit. 17-A, § 1251
Maryland:	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06; *id.*, Crim. Law §§ 2-201, 2-202, 2-203, 2-304
Michigan:	Mich. Comp. Laws Ann. §§ 712A.2d, 750.316, 791.234(6)(a)
Mississippi:	Miss. Code Ann. §§ 43-21-151(3), 43-21-157, 97-3-21
Missouri:	Mo. Ann. Stat. §§ 211.071, 565.020
Nebraska:	Neb. Rev. Stat. §§ 28-105, 28-303, 43-247

Nevada:	Nev. Rev. Stat. Ann. §§ 62B.330, 200.030
New Hampshire:	N.H. Rev. Stat. Ann. §§ 169-B:24, 628:1, 630:1-a
North Carolina:	N.C. Gen. Stat. Ann. §§ 7B-2200, 14-17
Oklahoma:	Okla. Stat. Ann. tit. 10A, § 2-5-101; *id.* tit. 21, § 701.9
Pennsylvania:	42 Pa. Cons. Stat. Ann. §§ 6302, 6355, 9711
Rhode Island:	R.I. Gen. Laws Ann. §§ 11-23-2, 14-1-7
South Carolina:	S.C. Code Ann. §§ 16-3-20, 63-19-1210(6)
South Dakota:	S.D. Codified Laws §§ 22-16-12, 22-6-1, 26-11-4
Tennessee:	Tenn. Code Ann. §§ 37-1-134, 39-13-202, 39-13-204
Vermont:	Vt. Stat. Ann. tit. 33, §§ 5102(2)(C), 5204; *id.* tit. 13, § 2303
Washington:	Wash. Rev. Code Ann. §§ 10.95.030, 13.40.110
West Virginia:	W. Va. Code Ann. §§ 49-5-10, 61-2-2, 62-3-15
Wisconsin:	Wis. Stat. Ann. §§ 938.18, 938.183, 940.01, 939.50(3)(a)
Wyoming:	Wyo. Stat. Ann. §§ 6-2-101, 14-6-203, 14-6-237

APPENDIX B

States in Which Children 14 and Older Are Exposed to a Sentence of Life Without Parole

Alabama:	Ala. Code §§ 12-15-203, 13A-5-39(1)
Arizona:	Ariz. Rev. Stat. Ann. §§ 13-501(B), 13-752(A)
Arkansas:	Ark. Code Ann. §§ 5-4-104(b), 9-27-318
Connecticut:	Conn. Gen. Stat. Ann. §§ 46b-127, 53a-35a, 53a-54a, 53a-54d
Iowa:	Iowa Code Ann. §§ 232.45(6)(a), 902.1
Massachusetts:	Mass. Gen. Laws Ann. ch. 119, § 74; *id.* ch. 265, § 2 (invalidated in non-pertinent part by *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984)).
Minnesota:	Minn. Stat. Ann. §§ 260B.125, 609.106
New Jersey:	N.J. Stat. Ann. §§ 2A:4A-26, 2C:11-3
New Mexico	N.M. Stat. Ann. §§ 31-18-14, 32A-2-3, 32A-2-20
North Dakota:	N.D. Cent. Code Ann. §§ 12.1-04-01, 12.1-16-01, 12.1-32-01
Ohio:	Ohio Rev. Code Ann. §§ 2152.10, 2929.03
Utah:	Utah Code Ann. §§ 76-2-301, 78A-6-602(3), 76-3-206
Virginia:	Va. Code Ann. §§ 16.1-269.1, 18.2-10

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 10-9647

In The
Supreme Court of the United States

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, Director, Arkansas Department of Correction,

Respondent.

On Writ Of Certiorari To The Arkansas Supreme Court

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QUESTIONS PRESENTED

1. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old-homicide offender?

2. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old-homicide offender who was not the triggerman or shown to have intended the killing, but who acted with reckless indifference to human life?

3. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a mandatory life-without-parole sentence on a 14-year-old-homicide offender?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT 10

I. The Eighth Amendment Does Not Impose A Categorical Ban On The Imposition Of Life Without Parole On Juvenile-Homicide Offenders 11

A. Petitioner has not met his heavy burden of establishing a societal consensus against the imposition of life without parole on 14-year-old-homicide offenders 13

1. Legislation 13

2. Sentencing Practices 19

B. The Court should not disregard the judgment of the citizenry and its legislatures to conclude that life without parole is an impermissible punishment for 14-year-olds who have committed the worst offense 25

1. Proportionality 26

2. Culpability 27

TABLE OF CONTENTS – Continued

Page

3. Penological Justifications 31

4. Petitioner's Proposed Rule 33

II. The Allegedly Mandatory Nature Of Petitioner's Sentence Does Not Render It Constitutionally Disproportionate, Assuming That The Court Addresses The Issue 36

III. Petitioner's Sentence Of Life Imprisonment Without Parole Is Not Disproportionate For His Commission Of A Homicide Even Though He Was Not The Triggerman 43

CONCLUSION 46

APPENDICES

Appendix A: Jurisdictions that Authorize Life Without Parole for Nontriggerman-Juvenile-Felony Murderers ..... App. 1

Appendix B: Jurisdictions that Authorize Life Without Parole for 14-Year-Old Felony Murderers ..... App. 8

Appendix C: Jurisdictions with Mandatory Sentence of Life Without Parole for 14-Year-Olds for at Least One Homicide Offense ..... App. 13

TABLE OF AUTHORITIES

Page

CASES

Albernaz v. United States, 450 U.S. 333 (1981).....16

Atkins v. Virginia, 536 U.S. 304 (2002) 13, 24, 25

Cannon v. University of Chicago, 441 U.S. 677 (1979).....16

Coker v. Georgia, 433 U.S. 584 (1977) 10, 11

Enmund v. Florida, 458 U.S. 782 (1982).....43

Ewing v. California, 538 U.S. 11 (2003)....28, 30, 42, 43

Golden v. State, 341 Ark. 656, 21 S.W.3d 801 (2000).....18

Graham v. Florida, 130 S. Ct. 2011 (2010).....*passim*

Harmelin v. Michigan, 501 U.S. 957 (1991).....26, 39, 42

Jackson v. State, 359 Ark. 87, 194 S.W.3d 757 (2004).....4

Jackson v. State, No. CA 02-535, 2003 WL 193412 (Ark. App. Jan. 29, 2003) (unpublished).....4

Kennedy v. Louisiana, 554 U.S. 407 (2008).....*passim*

Payne v. Tennessee, 501 U.S. 808 (1991).....10, 45

Posters 'N' Things, Ltd. v. United States, 511 U.S. 513 (1994).....36

Robinson v. California, 370 U.S. 660 (1962) 26

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

Rummel v. Estelle, 445 U.S. 263 (1980).....42

TABLE OF AUTHORITIES – Continued

Page

Shields v. State, 357 Ark. 283, 166 S.W.3d 28 (2004) 2, 38

Solem v. Helm, 463 U.S. 277 (1983) 10, 26, 29, 42

Stanford v. Kentucky, 492 U.S. 361 (1989) 22, 25, 30

State v. Stephenson, 340 Ark. 229, 9 S.W.3d 495 (2000) 36

Thompson v. Oklahoma, 487 U.S. 815 (1988) 35

Tison v. Arizona, 481 U.S. 137 (1987) 43, 44

Trop v. Dulles, 356 U.S. 86 (1958) 13

Weems v. United States, 217 U.S. 349 (1910) 27

Yee v. Escondido, 503 U.S. 519 (1992) 34

CONSTITUTIONAL PROVISIONS

Eighth Amendment to the United States Constitution ..... *passim*

Fourteenth Amendment to the United States Constitution i

STATUTES

18 U.S.C. § 1111 (2006) 14

18 U.S.C. § 5032 (2006) 14

2006 Virginia Acts, chs. 36, 733 (effective Jul. 1, 2006; amending Va. Code Ann. § 18.2-10) 15

TABLE OF AUTHORITIES – Continued

Page

2011 Nevada Laws Ch. 12 (A.B. 134) (effective Mar. 30, 2011; amending Nev. Rev. Stat. § 176.025) 15

Arkansas Acts 1999, No. 1192, § 7. 18

Arkansas Acts 1999, No. 1192, § 10. 18

Arkansas Acts 2001, No. 559, § 8 37

Arkansas Code Annotated § 5-4-104(f)(1) (Supp. 2011) 37

Arkansas Code Annotated § 5-10-101(b) (Repl. 1997) 4

Arkansas Code Annotated § 5-10-101(c) (Repl. 1997) 4

Arkansas Code Annotated § 9-27-318 (Supp. 1999) 2

Arkansas Code Annotated § 9-27-318(c)(2) (Repl. 2009) 41

Arkansas Code Annotated § 9-27-318(e) (Repl. 2009) 41

Arkansas Code Annotated § 9-27-318(g)(4) (Repl. 2009) 41

Arkansas Code Annotated § 9-27-318(*l*) (Repl. 2009) 41

Arkansas Code Annotated § 9-27-507(b)(2)(A)(i) (Repl. 2009) 17

Arkansas Code Annotated § 9-27-507(b)(2)(A)(ii) (Repl. 2009) 17

TABLE OF AUTHORITIES – Continued

Page

Arkansas Code Annotated § 9-27-510(c)(1)(B) (Repl. 2009) 17

Arkansas Code Annotated § 12-28-403(a) (Repl. 1999) (repealed by Ark. Acts 2001, No. 559, § 4) 37

Arkansas Code Annotated § 12-28-403(b)(1) (Repl. 1999) (repealed by Ark. Acts 2001, No. 559, § 4) 36

Arkansas Code Annotated § 12-28-403(b)(2) (Repl. 1999) (repealed by Ark. Acts 2001, No. 559, § 4) 37

Arkansas Code Annotated § 16-93-607(c)(1) (Supp. 2011) 17

California Penal Code § 190.5(b) (West 2008) 14, 19

Indiana Code § 35-50-2-3 (Lexis Repl. 2009) 14

Iowa Acts 2011 S.F. 533 § 147 (effective Jul. 27, 2011; amending Iowa Code § 902.1) 15

Louisiana Children's Code Annotated, art. 305 (West Supp. 2012) 14

Louisiana Children's Code Annotated, art. 857(A) (West Supp. 2012) 14

Louisiana Children's Code Annotated, art. 857(B) (West Supp. 2012) 14

Louisiana Statutes Annotated § 14:30(C) (West Supp. 2012) 14

Louisiana Statutes Annotated § 14:30.1(B) (West Supp. 2012) 14

TABLE OF AUTHORITIES – Continued

Page

Maryland Code Annotated Criminal Law § 2-202(b)(2) (West 2002) 18

Michigan Compiled Laws § 712A.4(1) (West 2002) 23

Michigan Compiled Laws § 712A.4(1) (West 1997) 23

Michigan Compiled Laws § 764.1f (West 1997) 23

Michigan Compiled Laws § 764.1f (West 2000) 23

Missouri Revised Statutes § 565.020(2) (1999) 18

New York Penal Law Annotated § 30.00 (West 2009) 14

New York Penal Law Annotated § 60.06 (West Supp. 2012) 14

North Carolina General Statutes § 14-17 (West Supp. 2010) 18

Ohio Revised Code Annotated § 2151.10 (Repl. 2011) 23

Ohio Revised Code Annotated § 2151.26 (Supp. 1996) 23

Texas Family Code § 51.02(2) (Vernon Supp. 2011) 14

Texas Family Code § 51.04(a) (Vernon 2008) 14

Texas Family Code § 54.02 (Vernon Supp. 2011) 14

TABLE OF AUTHORITIES – Continued

Page

Texas Penal Code § 12.31 (Vernon 2011) 14

Wyoming Statutes Annotated § 6-2-101(b) (Lexis 2011) 18

RULES

Supreme Court Rule 14.1(a) 34

OTHER AUTHORITIES

Amnesty Int'l & Human Rights Watch, "The Rest of Their Lives: Life Without Parole for Child Offenders in the United States" (2005) 22

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Human Rights Watch, "State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)" (Oct. 2009), available at http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (accessed Jan. 26, 2012) 35

"Juvenile Justice: A Century of Change" (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Dec. 1999) 15

TABLE OF AUTHORITIES – Continued

Page

Patrick Griffin et al., "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," National Report Series Bulletin (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Sept. 2011) 40

Wagdy Loza, "Predicting Violent and Nonviolent Recidivism of Incarcerated Male Offenders," 8 Aggressive and Violent Behavior 175 (2003) 33

STATEMENT OF THE CASE

On the night of November 18, 1999, Laurie Troup was shot and killed during a robbery at the Movie Magic video store where she worked in Blytheville, Arkansas. Petitioner, along with his cousin Travis Booker and friend Derrick Shields, robbed the store at around 8:00 p.m. (Trial Record ("TR") 196-98, 224-34, 287-88, 296-97)[1] Both petitioner and Shields were 14 years old, and Booker had turned 15 the previous day. (TR 280; State Exh. 2, Juvenile Transfer Hearing Record ("JTHR") 34-35, 62; State Exh. 4 at 1, 13, JTHR 35-36, 64)[2]

At the time of the robbery, petitioner and Booker knew Shields had a sawed-off, .410 shotgun hidden in the sleeve of his coat. (TR 228, 235, 286-87, 289, 292) When the three arrived at the video store, Shields and Booker walked inside and approached the counter, while petitioner remained outside by the open door in a position where he could see and hear Shields, Booker, and Troup. (TR 289-90) He saw Shields point the shotgun at Troup and heard him demand money from her several times. (TR 290, 294-95; State Exh. 3 at 6, TR 253-54, 364) When Troup denied having any money, petitioner entered the store, walked to the counter, and said, "We ain't

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[1] The trial record is on permanent file with the clerk of the Arkansas Supreme Court as *Jackson v. State*, No. CR 04-45.

[2] The juvenile-transfer record is on permanent file with the clerk of the Arkansas Supreme Court as *Jackson v. State*, No. CA 02-535.

playin'." (TR 226-27, 296) Shields demanded money again, and when Troup mentioned calling the police, Shields shot her in the head, killing her. (TR 231-32) Petitioner, Shields, and Booker immediately fled to petitioner's house without taking any money. (TR 232, 297)

At petitioner's house, the three discussed not saying anything to anyone about the crime. (TR 297) Petitioner, however, subsequently implicated himself in statements he made at school. (TR 265-66, 283-85) Additionally, a search of Shields's bedroom in connection with another offense turned up evidence of an unrelated robbery plan, which led to further investigation of the Movie Magic crimes. *Shields v. State*, 357 Ark. 283, 285-86, 166 S.W.3d 28, 30-31 (2004).

In March 2001, police questioned petitioner, who was then confined in the serious-offender program of the Arkansas Division of Youth Services. (TR 32, 40-41; State Exh. 5, JTHR 37, 65) Following questioning, police arrested petitioner for the Movie Magic crimes and transported him to the Mississippi County Detention Center. (TR 32, 35, 41-43) Petitioner was charged as an adult with being an accomplice to the crimes of capital murder and aggravated robbery. (JA 42-43) As authorized by Ark. Code Ann. § 9-27-318 (Supp. 1999), he filed a motion to transfer his case to the juvenile division of circuit court, and sought a forensic psychological evaluation. (JTHR 12-15)

Evidence presented at the hearing on petitioner's transfer motion included his juvenile-arrest history,

which dated back to June 1995, before petitioner was 10 years old, and which ended in 2000, with petitioner's placement in the serious-offender program. (State Exh. 5, JTHR 37-39, 65) Additionally, petitioner presented the report of his forensic psychological evaluation. It reflected a diagnosis of, among other things, "Conduct Disorder, Childhood-Onset," and concluded that petitioner was capable of understanding the charges, could assist his attorneys in his defense, and had been capable of conforming his conduct to the requirements of the law at the time of the crime. (Def. Exh. 1, JTHR 70-71, 87)

The evidence also showed that, while in the Mississippi County jail awaiting trial on the capital-murder and aggravated-robbery charges, petitioner escaped. (State Exh. 7, JTHR 48, 67) According to a report prepared after petitioner's capture, petitioner explained that he had switched identities with another inmate, Travis Anderson, who was scheduled to be released from the jail that day. When a jailer came to process Anderson for release, petitioner – having donned Anderson's clothing – pretended to be Anderson, signed his release papers, left the jail, and caught a ride to another town. (State Exh. 7 at 4-5, JTHR 48, 67)

The court denied petitioner's motion to transfer, relying on petitioner's history of juvenile adjudications and antisocial behavior and emphasizing the serious nature of the offenses – particularly the fact that someone's life had been taken, that the crime involved a firearm, and that the underlying purpose

of the crime was pecuniary gain. (JTHR 24-26, 76-77, 79) The Arkansas Court of Appeals affirmed, *Jackson v. State*, No. CA 02-535, 2003 WL 193412 (Ark. App. Jan. 29, 2003) (unpublished), and the case proceeded to trial. There, the jury rejected petitioner's affirmative defense pursuant to Ark. Code Ann. § 5-10-101(b) (Repl. 1997), that, as a nontriggerman, he did not in any way "solicit, command, induce, procure, counsel, or aid in [the] commission[ ]" of the homicidal act, and convicted him of capital murder and aggravated robbery. (TR 13-14, 356-57) The court "merged" the aggravated-robbery conviction with the capital-murder conviction and imposed a sentence of life imprisonment without parole for capital murder pursuant to Ark. Code Ann. § 5-10-101(c) (Repl. 1997). (TR 357-59)

On direct appeal, petitioner challenged the sufficiency of the evidence, contending that he had not participated in the robbery or the shooting to an extent sufficient to support a finding of guilt. The Arkansas Supreme Court affirmed his conviction, finding substantial evidence to support the jury's determination that petitioner aided the aggravated robbery and the homicide. *Jackson v. State*, 359 Ark. 87, 90-92, 194 S.W.3d 757, 759-60 (2004). The court noted, in particular, that the jury had been free to accept Booker's account that petitioner said, "We ain't playin'" just before Troup was shot. *Id.*, 359 Ark. at 91-92, 194 S.W.3d at 760. The court concluded this evidence was sufficient to show petitioner, in fact, aided in the robbery and homicide. *Id.*, 359 Ark. at 92, 194 S.W.3d at 760.

Petitioner did not seek ordinary post-conviction relief, but in 2008, he filed a petition in circuit court seeking the extraordinary remedy of habeas corpus. (JA 5-40) Relying largely on *Roper v. Simmons*, 543 U.S. 551 (2005), petitioner asserted, first, that the Eighth Amendment prohibits a sentence of life imprisonment without parole for someone who was 14 years old at the time of the offense. (JA 11-26) Second, he asserted that the mandatory nature of his sentence to life without parole violated the Eighth Amendment because it did not allow a process for consideration of mitigating evidence. (JA 26-37) The State filed a motion to dismiss, claiming the petition did not state grounds for relief cognizable in state-habeas proceedings. (Habeas Record ("HR") 105-09) The circuit court agreed and dismissed the petition. (JA 72-76)

Petitioner appealed, and while his appeal was pending, this Court decided *Graham v. Florida*, 130 S. Ct. 2011 (2010). Following full briefing by the parties, the Arkansas Supreme Court affirmed the circuit court's decision granting the State's motion to dismiss. (JA 77-82) The court recited its familiar rule that, while detention for an illegal period of time is precisely what a writ of habeas corpus is meant to correct, if a sentence is within the limits set by the state legislature, it will not be considered illegal for purposes of issuing the remedy of habeas corpus. (JA 78-79) The court concluded that petitioner's sentence was within the limits set by the legislature and,

therefore, was not an illegal sentence for purposes of state habeas-corpus relief. (JA 80)

The court went on, however, to consider petitioner's argument that the logic of *Graham* and *Roper* invalidated his sentence to life imprisonment without parole for capital murder. (JA 80-82) The court concluded that the holdings in *Roper* and *Graham* did not extend to such sentences. (JA 81-82) It affirmed the lower court's judgment, stating petitioner had "failed to allege or show that the original commitment was invalid on its face or that the original sentencing court lacked jurisdiction to enter the sentence." (JA 82) One justice concurred in the decision, and two dissented. (JA 82-89) Following the decision affirming the denial of habeas relief, petitioner filed a petition for a writ of certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

Petitioner's sentence of life imprisonment without parole for the crime of capital murder, though severe, does not violate the Eighth Amendment. This Court has recognized that murder is the worst of crimes and that even the most serious violent crime short of it cannot be compared with the unjustified taking of human life. It is, of course, a fundamental precept of justice that punishment for a crime should be graduated and proportioned to the offense. Consequently, legislatures are entitled to conclude that those who commit homicide are deserving of the most

serious forms of punishment, including life imprisonment without parole. This Court's decisions in *Graham* and *Roper* are entirely consistent with that principle, and they do not warrant a categorical rule foreclosing a sentence of life without parole for a juvenile who has committed capital murder.

While *Graham* and *Roper* recognize that, relative to adult offenders, juvenile offenders are not as culpable and, therefore, may not be sentenced to death for the crime of homicide and life without parole for nonhomicide crimes, both cases also recognize that, relative to other youths who offend, juvenile-homicide offenders are the most culpable and may receive the penultimate punishment of life without parole. This view is shared by an overwhelming majority of state legislatures and the federal government, which authorize the imposition of life without parole upon 14-year-old-homicide offenders such as petitioner. This view also is reflected in the nation's sentencing practices, which give no indication of a downward trend in the imposition of life-without-parole sentences on juvenile-homicide offenders and which show the proportion of such sentences imposed on 14-year-old-homicide offenders is exponentially greater than the proportion that demonstrated rarity of the sentence in *Graham*.

Petitioner's effort to downplay the highly culpable nature assigned to his crime by the nation's legislatures and by this Court is misguided. As petitioner would have it, he gets the benefit of *Graham*'s categorical ban on sentences of life without parole

regardless of the crimes he has committed because the diminished culpability recognized by *Graham* and *Roper* is not crime specific. While juveniles' culpability might be diminished relative to adults who commit the same crimes, *Graham* and *Roper* did not hold that the culpability of juvenile offenders is static and equal. Rather, they establish that while a juvenile-homicide offender cannot be sentenced to death, that offender can still warrant greater punishment than a juvenile-nonhomicide offender. Thus, the gravity of petitioner's crime remains central to the Eighth Amendment analysis, and *Graham* does not require that the potential juveniles might have to grow and change categorically outweighs the known severity and irrevocability of death that they have inflicted on their victims and the substantial justifications that exist for a sentence of life without parole in those circumstances.

That life without parole allegedly was the only sentence petitioner could receive upon conviction also does not render his sentence unconstitutional, assuming the issue squarely is before the Court. Outside of the death-penalty context, this Court has never required discretionary sentencing, and the logic of *Graham* and *Roper* does not warrant the drastic measure of mandating that the states provide it in juvenile-homicide cases. While *Graham* and *Roper* hold that youth is relevant in the Eighth Amendment context, they expressly note that a discretionary-sentencing scheme would be inadequate to redress the constitutional concerns in those contexts. Petitioner

has offered no reason for the Court to reassess that conclusion here.

Moreover, such a sentencing scheme is not necessary in order to account for the relevance of youth recognized in *Graham* and *Roper*. The absence of a discretionary-sentencing scheme does not foreclose consideration of youth in juvenile-homicide cases involving potential life-without-parole sentences, as youth otherwise is and can be considered. Pre-conviction, juveniles' special status is taken into account in a variety of settings, with consideration being given to juveniles' youth and level of culpability. And post-conviction, youth and other allegedly mitigating evidence can be taken into account as part of the threshold consideration in a gross-disproportionality analysis, which allows for consideration of characteristics of individual offenders, including their culpability. Because the criminal-justice system already provides for adequate consideration of juvenile-homicide offenders' youth, the Court need not use the Eighth Amendment to impose discretionary-sentencing schemes on the states.

Finally, petitioner's sentence is not rendered disproportionate by virtue of the fact that he was not the triggerman, as he would be a death-eligible offender if he were an adult under this Court's precedents. His major participation in an aggravated robbery, combined with his reckless indifference to the victim's life, render him highly culpable and, but for his youth, could subject him to the death penalty. As a highly culpable juvenile-homicide offender,

petitioner is not entitled to the twice diminished moral culpability that *Graham* offers to nonhomicide offenders, and he constitutionally can be subject to life imprisonment without the possibility of parole.

ARGUMENT

This Court has long recognized that states have "the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). For this reason, "[r]eviewing courts . . . grant substantial deference to the . . . punishments for crimes" set by state legislatures. *Solem v. Helm*, 463 U.S. 277, 290 (1983). The Eighth Amendment overrides those legislative determinations, however, in those rare instances when "a punishment is [so] 'excessive'" that it "makes no measurable contribution to acceptable goals of punishment" or it "is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). The punishment imposed on petitioner – life without the possibility of parole for the offense of felony murder – does not fall within those narrow categories.

To be sure, in *Graham* the Court held that a life-without-parole sentence imposed on a juvenile who committed armed burglary was grossly disproportionate. But this case differs from *Graham* in two

fundamental respects. First, even the most "serious violent offenses against the individual . . . cannot be compared to murder in their severity and irrevocability." *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (citation and quotations omitted). A juvenile murderer is therefore far more culpable than a juvenile who commits a nonhomicide offense and deserves a greater punishment. Second, for that reason, not only is there no societal consensus *against* the imposition of life-without-parole sentences on juvenile murderers, there is a consensus *in support of* such sentences. Thirty-nine jurisdictions authorize the imposition of such sentences; and two-thirds of them mandate it. And whereas only a tiny fraction of juveniles who committed nonhomicide offenses had been sentenced to life without parole, the same cannot be said of juvenile murderers. In light of the substantial differences between this case and *Graham*, a categorical ban is not warranted here.

I. The Eighth Amendment Does Not Impose A Categorical Ban On The Imposition Of Life Without Parole On Juvenile-Homicide Offenders.

Murder is "the worst of crimes." *Kennedy*, 554 U.S. at 447. Indeed, most serious violent crime cannot, "in terms of moral depravity and of the injury to the person and the public[,]" even be "compare[d] with murder, which . . . involve[s] the unjustified taking of human life." *Coker*, 433 U.S. at 598 (plurality opinion). Given the "severity and irrevocability" of

murder, *Kennedy*, 554 U.S. at 438 (citation and quotations omitted), 14-year-olds who commit that offense are sometimes sentenced to life without parole, "the second most severe penalty permitted by law." *Graham*, 130 S. Ct. at 2027 (citation and quotations omitted). The Eighth Amendment – even as construed in this Court's decisions limiting sentences states can impose on juveniles – does not prohibit that practice.

In *Roper*, when striking down the death penalty for juveniles, the Court placed its imprimatur on such life-without-parole sentences by "noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person[ ]" and confirming that "the State can exact forfeiture of some of the most basic liberties[ ]" when a juvenile "commits a heinous crime." 543 U.S. at 572, 573-74. *Graham* also expresses tacit approval of life-without-parole sentences for juvenile-homicide offenders, as it points up the distinction between juveniles who murder and those who do not, with the latter's crimes differing from the former's "in a moral sense." 130 S. Ct. at 2027; *see also id.*, at 2041 (Roberts, C.J., concurring in the judgment) (noting Court's "apparent" support of life without parole for juvenile-homicide offenders); *id.*, at 2055 (Thomas, J., dissenting) (observing that holding left "intact" laws permitting life-without-parole sentences for juvenile-homicide offenders).

Whether the Eighth Amendment categorically bans the imposition of life-without-parole sentences on 14-year-old murderers depends on "the evolving

standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). Those standards necessarily take into consideration the severity of the crime of murder, which influences both parts of the analysis the Court has developed to assess whether a type of punishment is categorically banned under the Eighth Amendment. The Court first "considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a societal consensus against the sentencing practice at issue." *Graham*, 130 S. Ct. at 2022 (citation and quotations omitted). Then, the Court exercises its "independent judgment" to determine whether a particular sentencing practice is unconstitutional. *Id.*, at 2022. A categorical ban on the imposition of life-without-parole sentences upon 14-year-old-homicide offenders is not warranted under either step of the analysis.

A. Petitioner has not met his heavy burden of establishing a societal consensus against the imposition of life without parole on 14-year-old-homicide offenders.

1. Legislation

"[L]egislation enacted by the country's legislatures[,]" which provides the "clearest and most reliable objective evidence of contemporary values[,]" *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (citation and quotations omitted), establishes overwhelmingly

the societal consensus in favor of life-without-parole sentences for 14-year-old-homicide offenders. Thirty-eight of the 50 states authorize the imposition of life without parole upon 14-year-old-homicide offenders.[3] The federal government also authorizes life imprisonment without the possibility of parole for juvenile-homicide offenders beginning at the age of 13. *See* 18 U.S.C. §§ 1111, 5032 (2006). In addition to homicide generally, at least 32 states and the federal government authorize life without parole for nontriggerman-juvenile-felony murderers, while at least 31 states and the federal government authorize life without parole for 14-year-old felony murderers. *See* Appendices A & B, *infra*. Finally, the federal government and 26 of the 38 states that authorize life-without-

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[3] Petitioner states that 39 states authorize life without parole for 14-year-old murderers. *See* Pet. Br. at Appendices A & B. The State has excluded New Mexico from its count. The number 38 does not include, however, an additional five states that authorize life without parole for older juveniles who petitioner apparently also would like to sweep into his proposed categorical rule. *See* Tex. Penal Code § 12.31 (Vernon 2011); Tex. Fam. Code §§ 51.02(2), 54.02 (Vernon Supp. 2011); *id.*, at § 51.04(a) (Vernon 2008) (authorizing, with one exception, life without parole for 17-year-olds); N.Y. Penal Law Ann. § 30.00 (West 2009), *id.*, at § 60.06 (West Supp. 2012) (authorizing life without parole for first-degree murderers 16 and older); La. Stat. Ann. §§ 14:30(C), 14:30.1(B) (West Supp. 2012); La. Child. Code Ann., arts. 305, 857(A) & (B) (West Supp. 2012) (authorizing life without parole for juveniles 15 and older convicted of certain enumerated felonies); Ind. Code § 35-50-2-3 (Lexis Repl. 2009) (authorizing life without parole for murderers 16 and older); Cal. Penal Code § 190.5(b) (West 2008) (authorizing life without parole for first-degree murderers 16 and older).

parole sentences for 14-year-olds *mandate* it in some circumstances, meaning that it is the *only* punishment authorized for those offenses. *See* Appendix C, *infra*.

The recent vintage of many of the laws authorizing sentences of life without parole for 14-year-old-homicide offenders further supports the national legislative consensus in favor of them, for this Court has looked to "the direction of change[ ]" when assessing whether a consensus exists. *Roper*, 543 U.S. at 566 (citation and quotations omitted). Many of the state laws authorizing – indeed, requiring – life-without-parole sentences for juvenile murderers were passed in the mid-1990s. *See* "Juvenile Justice: A Century of Change," at 19 (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Dec. 1999). And there is no evidence of a mounting retreat. In fact, in 2011, the Iowa legislature reaffirmed that life without parole is the only sentence available for 14-year-old first-degree felony murderers. Iowa Acts 2011 S.F. 533 § 147 (effective Jul. 27, 2011; amending Iowa Code § 902.1); *see also* 2011 Nevada Laws Ch. 12 (A.B. 134) (effective Mar. 30, 2011; amending Nev. Rev. Stat. § 176.025) (amending statute to conform with *Graham* and affirming availability of life without parole for juveniles); 2006 Va. Acts, chs. 36, 733 (effective Jul. 1, 2006; amending Va. Code Ann. § 18.2-10) (amending statute to conform with *Roper* and reaffirming that life without parole is mandatory for juveniles). All told, there is a clear national legislative consensus

authorizing life without parole for 14-year-old-homicide offenders, including for the specific class in which petitioner falls.

Petitioner's effort to discount this overwhelming consensus is flawed. He first argues that the imposition of life without parole is merely "adventitious," Pet. Br. at 44, that there is no evidence that state legislatures actually mean to allow life-without-parole sentences to be imposed upon juveniles who commit homicides, but he is wrong. The statutory authorization of an adult sentence upon a juvenile should, alone, be enough to settle the question against him in light of this Court's oft-repeated observation that, when enacting legislation, it is presumed that "elected representatives . . . know the law" and thus not only know what they are authorizing, but also the existing backdrop against which they are doing it. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (referring to members of Congress); *see also Albernaz v. United States*, 450 U.S. 333, 342 (1981) (opining that "[i]t is not a function of this Court to presume that Congress was unaware of what it accomplished[ ]") (citation and quotations omitted); *but see Graham*, 130 S. Ct. at 2026 (observing that "statutory eligibility" of life-without-parole sentence for a juvenile-nonhomicide offender "does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration[ ]").

Perhaps more importantly, it simply is not the case, as petitioner asserts, that life without parole is

merely "theoretical[ly] availab[le]" or that the legislatures that authorize it are not aware, with the exception of Massachusetts, that they are doing so. Pet. Br. at 47. As the State already has noted, life without parole is the *only* penalty the federal government and 26 states authorize for certain homicide offenses committed by certain 14-year-olds, hardly rendering it merely theoretically available. Moreover, in a number of states, legislators have expressed their awareness of subjecting 14-year-olds to life without parole. Arkansas, for example, expressly provides that juveniles who are designated extended-juvenile-jurisdiction offenders – those who are subject to both juvenile disposition and an adult sentence – are subject to "the full range of adult sentencing[,]" with the sentence not to exceed 40 years, except for juveniles adjudicated delinquent for capital and first-degree murder. Ark. Code Ann. § 9-27-507(b)(2)(A)(i) & (ii) (Repl. 2009). Those offenders can be sentenced "for any term, up to and including life[,]" *id.*, at § 9-27-507(b)(2)(A)(ii), except that, unlike juvenile offenders who are sentenced like adults, they are "subject to parole[ ]" for those offenses. *Id.*, at § 9-27-510(c)(1)(B); *see also* Ark. Code Ann. § 16-93-607(c)(1) (Supp. 2011). The legislature's authorization of life imprisonment with parole for certain juveniles originally adjudicated delinquent in juvenile proceedings makes clear its understanding that those convicted as

adults in the first instance are subject to the full range of punishment to which adults are subject.[4]

Other jurisdictions that petitioner either has not cited or has cited in a footnote as "arguably authoriz[ing] life without parole[,]" Pet. Br. at 46 n.54, also make clear their legislatures' awareness of subjecting juveniles to life imprisonment without the possibility of parole. North Carolina, for example, provides that a person who commits murder in the first degree and "who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole." N.C. Gen. Stat. § 14-17 (West Supp. 2010). Similarly, Wyoming authorizes the punishment of death, life imprisonment without parole, or life imprisonment "according to law[]" for first-degree murder, "except that no person shall be subject to the penalty of death for any murder committed before the defendant attained the age of eighteen (18) years." Wyo. Stat. Ann. § 6-2-101(b) (Lexis 2011); *see also, e.g.*, Md. Code Ann. Crim. Law § 2-202(b)(2) (West 2002) (providing that a defendant under 18 shall not be sentenced to death, but to life without parole or life imprisonment for first-degree murder); Mo. Rev.

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[4] The statutory provisions governing extended-juvenile-jurisdiction offenders were in effect at the time petitioner committed his crimes. They were enacted in 1999, in the wake of 1998 shootings at an Arkansas middle school, where an 11-year-old and a 13-year-old killed five and injured 10 others. *See Golden v. State*, 341 Ark. 656, 658, 21 S.W.3d 801, 801-02 (2000); Ark. Acts 1999, No. 1192, §§ 7, 10.

Stat. § 565.020(2) (1999) (authorizing life without parole or death for first-degree murder, except not for the latter when the defendant is under 16); *cf.* Cal. Penal Code § 190.5(b) (West 2008) (authorizing life without parole for juveniles 16 years old and older found guilty of first-degree murder). In short, the consensus that life without parole is a permissible sentence for a juvenile-homicide offender is not an "unconsidered consequence" of juvenile-transfer statutes, as petitioner would have it. Pet. Br. at 43.

2. Sentencing Practices

Actual sentencing practices are in accord with the legislative consensus. Petitioner asserts that there are "about 79 persons" serving life-without-parole sentences for offenses they committed at the age of 13 or 14. Pet. Br. at 47.[5] Taking petitioner's

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[5] There is reason to doubt the accuracy of this number, if for no other reason than that petitioner does not attempt to identify the number of offenders from any particular jurisdiction since the release of the study self-published by his attorneys, dated January 2008. *Id.*, at 47 n.57; *see also* Equal Justice Initiative, "Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison," at 20 (2008). At least for Arkansas, petitioner appears to have the number wrong, as the study states that there are four offenders, with his brief and that of the petitioner in *Miller v. Alabama*, No. 10-9646, identifying two more. *See* Pet. Br. at 47 n.57 & 49 n.62; Miller Pet. Br. at 24 n.31. The State has been informed by its corrections officials that there are at least seven homicide offenders in Arkansas serving life sentences for offenses committed when they were 14 years old: John McNeely, John Ponder, Willie Mitchell, Cedric Harris,

(Continued on following page)

number of 79 at face value, it does not support his argument of constitutionally disproportionate rarity. The relatively low incidence of 14-year-old-homicide offenders serving life-without-parole sentences reflects the low incidence of 14-year-old-homicide offenders generally, not an unwillingness to impose life sentences on them. As petitioner himself admits, "[h]omicides by young teens are themselves infrequent[,]" with young adolescents representing "only a tiny fraction of the total number of homicide arrests every year." Pet. Br. at 5, 54 (footnote omitted from latter). Indeed, his own numbers demonstrate that, thankfully, 14-year-olds rarely are even arrested for homicides, much less prosecuted for them either through juvenile or adult court. *Id.*, at 54 n.67 (noting that of 8,667 murder or non-negligent homicide arrestees in 2010, 73 or .8% were 14 years old or younger); *id.*, at 57 n.75 (reciting that of 19,941 murder or non-negligent homicide arrestees in 1992, 304 or 1.6% were 14 years old or younger). The State has not found evidence to contradict petitioner's assertion of the rarity of homicides committed by 14-year-olds.

Brandon Isbell, petitioner, and petitioner's triggerman, Derrick Shields. Petitioner's counsel have stated that they "extensive[ly]" searched for evidence of all relevant offenders. Pet. Br. at 47 n.57. The State does not dispute this. Their deficient effort in Arkansas, however, merely points up the difficulty in ascertaining an accurate number and the harder still enterprise of deciding whether to base a constitutional rule upon it.

Whatever the exact rate of commission of homicides by 14-year-olds, the proportion of life-without-parole sentences imposed upon such offenders is exponentially greater than the proportion the Court concluded demonstrated rarity in *Graham*. There, the Court looked to "the base number of certain types of offenses[,]" for which juveniles were arrested in 2007 – a total of 380,480 arrests. *Id.*, at 2025. Against this total of 380,480 arrests, the Court concluded that, "in proportion to the opportunities for its imposition[,]" the 123 such sentences that had been imposed were rare. *Id.*, at 2025. Here, there were 73 arrests of 14-year-olds or younger for murder and non-negligent homicide in 2010, and there are 79 homicide offenders serving such sentences. In stark contrast to *Graham*, the relatively small number of 14-year-olds sentenced to life without parole for homicide merely mirrors the small number of them who commit those crimes in the first instance.

An added contrast to *Graham* is the fact that, among the jurisdictions authorizing sentences of life without parole for 14-year-old-homicide offenders, a greater number of jurisdictions impose them for homicide than did for nonhomicide in *Graham*. Here, petitioner asserts that the 14-year-old-homicide offenders currently imprisoned for life without parole are distributed among 18 states. Pet. Br. at 49. That number represents a 64% increase in the number of states imposing sentences of life without parole in homicide cases over the 11 jurisdictions that imposed such sentences on nonhomicide offenders in *Graham*.

130 S. Ct. at 2024. The significance of that increase is heightened when one considers that a greater number of states impose the penalty for a fewer number of more serious offenders.

Petitioner's bare citation to 79 offenders also does not show that life-without-parole sentences are imposed less frequently on juvenile murderers than they are upon adult murderers. Despite having the burden of proving the absence of a national consensus, *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989), petitioner cites to no statistics showing what percentages of juveniles who are prosecuted as adults and are convicted of homicide offenses actually receive life-without-parole sentences. He similarly does not provide statistics as to how often life without parole is imposed upon adults convicted of homicide, so that a meaningful determination could be made as to whether 14-year-olds receive life without parole at a significantly lower rate than similarly situated adults. And a report petitioner cites in his brief, Pet. Br. at 62, states that "in eleven out of the seventeen years between 1985 and 2001, youth convicted of murder in the United States were *more* likely to enter prison with a life without parole sentence than adult murder offenders." Amnesty Int'l & Human Rights Watch, "The Rest of Their Lives: Life Without Parole for Child Offenders in the United States" 2 (2005) (emphasis in original). Petitioner therefore has presented no factual basis upon which to allege a societal

reluctance to impose the sentence against 14-year-olds.[6]

Nor does the evidence of 79 offenders demonstrate a downward trend in the imposition of life-without-parole sentences that might suggest contemporary society has eschewed the practice. Relying on a study published by the Equal Justice Initiative in January 2008, petitioner asserts that, as of that date, 73 offenders were serving life without parole for offenses they committed when they were 13 or 14. *See* Pet. Br. at 47 n.57. As of the date of the filing of his brief, he states that there are some 79, "plus or minus

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[6] Petitioner undoubtedly is correct when he states that 79 offenders represents an "*accumulation*" of sentences over many years, Pet. Br. at 48 & n.58 (emphasis in original), but the statement is misleading to the extent that it implies that the sentence of life without parole has been available for 14-year-olds since 1971 in the 39 jurisdictions in which it currently is available, providing those jurisdictions with "extensive[]" opportunities to impose it. *Id.*, at 52. Ohio, for example, did not authorize 14-year-olds to be subject to adult conviction for capital murder until 1996. *See* Ohio Rev. Code Ann. § 2151.26 (Supp. 1996) (currently codified at Ohio Rev. Code Ann. § 2151.10 (Repl. 2011)); *see also, e.g.*, Mich. Comp. Laws §§ 712A.4(1) and 764.1f (West 1997) (authorizing automatic waiver for 14-year-olds who commit certain serious violent felonies, including first-degree murder, effective January 1, 1997) (currently codified at Mich. Comp. Laws §§ 712A.4(1) (West 2002) and 764.1f (West 2000)). Moreover, petitioner's own argument contradicts this implication, as he asserts that "fears of a massive increase in violent juvenile crime" in the 1990s "stimulated many of the legal changes that removed young adolescents from juvenile courts and exposed them to sentences of life without parole." Pet. Br. at 54.

one or two[,]" due to "some" receiving relief from their sentences, while "some new sentences" also have been imposed. *Id.* Assuming that as few as two offenders obtained relief and accounting for the two Arkansas offenders originally not included, there appears to be a net gain of six offenders since January 2008 by petitioner's own count. As this Court has noted when discussing legislative trends in this context, "it is not so much the number of these States that is significant, but the consistency of the direction of change[ ]" in assessing the absence of consensus. *Roper*, 543 U.S. at 566 (citation and quotations omitted). So, too, with actual sentencing practices. *See*, *e.g.*, *id.*, 543 U.S. at 564-65 (relying on fact that only three juveniles executed in 10 years as evidence of lack of consensus); *Atkins*, 536 U.S. at 316 (relying on fact that only five states had executed mentally retarded offenders in past 13 years). The statistics here show no consistent change in direction against the challenged practice, only its continued acceptance.

As his final argument concerning consensus, petitioner cites to international law as evidence of the "global consensus" against the practice of imposing life without parole on juveniles. Pet. Br. at 50 (quoting *Graham*, 130 S. Ct. at 2033). While the Court admittedly has looked to international law and the laws of other nations to "confirm[ ]" its "own conclusions" as to the meaning of the Eighth Amendment, *Roper*, 543 U.S. at 578, it has not viewed "those norms a[s] binding or controlling[.]" *Graham*, 130 S. Ct. at 2034. Thus, the alleged international consensus upon

which petitioner relies plays no role in deciding whether there is a "national consensus[ ]" in this country against the practice. *Id.*, at 2023. As the State has explained, there is not, and the Court need not look to international law to dispel that view. Petitioner has not demonstrated a national consensus against the imposition of life without parole on 14-year-old-homicide offenders, despite his "heavy burden" to do so. *Stanford*, 492 U.S. at 373 (citation and quotations omitted).

B. The Court should not disregard the judgment of the citizenry and its legislatures to conclude that life without parole is an impermissible punishment for 14-year-olds who have committed the worst offense.

Once the Court receives "essential instruction[ ]" on the objective indicia of national consensus, *Roper*, 543 U.S. at 564, it determines whether, in the exercise of its independent judgment, "there is reason to disagree with the judgment reached by the citizenry and its legislators[ ]" concerning the propriety of a particular punishment. *Atkins*, 536 U.S. at 313. Here, there is no reason for the Court to disregard the judgment of the citizenry and its legislators that life without the possibility of parole is a permissible sentence for 14-year-old-juvenile murderers. Society is justified in sentencing them to the penultimate punishment for their commission of the worst crime.

1. Proportionality

Petitioner does not seriously dispute the assessment of both the nation's legislatures and the Court that juvenile-homicide offenders have committed the worst crime, but instead attempts to temper its significance by arguing that the diminished culpability of juveniles that this Court recognized in *Roper* and *Graham* is not crime specific. By doing so, petitioner essentially argues that consideration of the crimes he has committed is irrelevant to his excessive-sentence claim. That contention is untenable for the offenses committed lie at the heart of any such claim. In *Robinson v. California*, 370 U.S. 660, 667 (1962), the Court made clear that a claim that a sentence is constitutionally excessive cannot be evaluated merely by freestanding consideration of its length. Rather, the validity of a sentence must be assessed in relation to the offenses for which it was imposed. *Id.*, 370 U.S. at 667.

Stated differently, "the Eighth Amendment's protection against excessive or cruel and unusual punishments flows from the basic precept of justice that punishment for a crime should be graduated and proportioned *to the offense*." *Kennedy*, 554 U.S. at 419 (emphasis added; citation and quotations omitted). For that reason, the Court has "never invalidated a penalty mandated by a legislature based only on the length of sentence[.]" *Harmelin v. Michigan*, 501 U.S. 957, 1006-07 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *see also Solem*, 463 U.S. at 288-90 (holding that "a criminal sentence

must be proportionate *to the crime* for which the defendant has been convicted[ ]") (emphasis added). Whatever else *Graham* and *Roper* may stand for, they do not jettison the overriding conception that forms the basis of an Eighth Amendment excessive-sentence claim: "that punishment . . . should be graduated and proportioned to [the] offense." *Graham*, 130 S. Ct. at 2021 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)); *Roper*, 543 U.S. at 560 (same). Although he understandably wishes it were not so, the offense that petitioner committed is an integral part of his claim of excessiveness.

2. Culpability

Petitioner's claim that juveniles have lessened culpability as a rule and thus cannot be sentenced to life without parole no matter what crime they have committed places more weight on *Graham* and *Roper* than they can bear. Despite their adoption of categorical bans on certain kinds of punishments due to the reduced culpability of juveniles, *Graham* and *Roper* are consistent with this Court's long-term recognition that the unjustified killing of another human being is not comparable to other offenses. Although *Graham* prohibits the imposition of a sentence of life without parole upon juveniles who do not kill and *Roper* prohibits the imposition of the death penalty on juveniles who do, both adhere to this Court's understanding that homicide is the worst possible crime that a person can commit, deserving of, at the very least, the penultimate punishment. Consistently with

this Court's cases, legislatures are entitled to conclude that one category of offenses is worse than all the others – unjustified homicide – and can exact a higher, although not the ultimate, price for its commission, even in the case of juveniles. *Cf.*, *e.g.*, *Ewing v. California*, 538 U.S. 11, 28 (2003) (plurality opinion) (observing that "[i]t is enough that the [s]tate . . . ha[d] a reasonable basis for believing" the challenged sentence "advances the goals of its criminal justice system in any substantial way[ ]") (citation and quotations omitted).

Interjecting scientific studies into the calculus does not render life imprisonment without the possibility of parole disproportionate for juvenile-homicide offenders. The State does not dispute the general proposition advocated by petitioner, buttressed by his reliance on numerous studies and accepted by the Court in both *Roper* and *Graham*, that juveniles, as a general matter, are less culpable than are adults. It does not even dispute the additional propositions that juveniles, as a general matter, tend to engage in risky behavior, are sensation seeking, and are impulsive, or that "it is statistically aberrant for boys to refrain from minor criminal behavior" during young adolescence. Pet. Br. at 24. These propositions, however, do not answer the question at hand. Despite their tendency to be impulsive, engage in risky behavior, or be sensation seeking, most juveniles do not commit violent crimes and only a minute fraction of them commit murder. Indeed, by petitioner's own admission, engaging in violent crime and committing felony

murder are statistically aberrant (not to mention societally aberrant). States should not be precluded from treating any of those specific statistically aberrant situations differently based upon generalizations about the typical adolescent. The Eighth Amendment does not require this when the juvenile has taken a life.

Not content to rely only on scientific evidence, petitioner asserts that juveniles' lack of maturity also is "obvious to parents, teachers, and any adult who reflects back on his or her own teenage years[.]" Pet. Br. at 18. Thus, petitioner essentially claims that it is "self-evident" that juveniles are inherently less culpable and that there is a "societal understanding" concerning this that this Court must enforce. What petitioner's argument fails to consider is that legislators – who surely are aware of this societal understanding – nonetheless also concluded that, despite their youth, at least some juveniles are sufficiently precocious in their criminality to warrant the exceptional punishment of life without the possibility of parole. This Court must give deference to that legislative choice. *See Solem*, 463 U.S. at 290.

Laws prohibiting juveniles from voting, serving on juries, marrying, and the like and those affording them heightened protection, which petitioner invokes, are not in tension with the legislative decision that particular juveniles are sufficiently mature in their criminality. The same legislators who enacted laws barring juveniles from certain activities and affording them heightened protection also have made juvenile

murderers subject to life-without-parole sentences, and there is no reason to focus on the former group of laws to the exclusion of the latter. Even leaving this aside, however, the fact that juveniles as a class may be viewed as unsuited to vote, serve on a jury, or drive – with an individualized inquiry not worth the societal cost in those contexts – does not conflict with determinations that certain juveniles should be subjected to adult punishments, commensurate with the harm they have caused to both society and victims.

Moreover, even if laws concerning juveniles were in tension with one another, petitioner does not explain why the legislative consensus of generalized diminished culpability in the civil context must trump the legislative consensus of nondiminished culpability for the crime of murder in the criminal context, much less why it is of constitutional import. As the plurality noted in *Stanford*, the level of maturity needed "to drive carefully, to drink responsibly, or to vote intelligently[ ]" simply is not comparable to the level of maturity needed "to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards." 492 U.S. at 374. As it is, legislatures are no doubt aware of these competing concerns, and their striking of a balance in the way that they conclude best protects both juveniles and adults surely cannot be deemed disproportionate in the constitutional sense. *See, e.g.*, *Ewing*, 538 U.S. at 28 (plurality opinion).

3. Penological Justifications

Turning to penological considerations, petitioner relies chiefly on *Graham*, 130 S. Ct. at 2028-30, to argue that juveniles' potential for growth and reformation outweighs any other justification there might be for their serving life-without-parole sentences. Pet. Br. at 40-41. Petitioner again has placed too much weight on *Graham*. *Graham*'s rejection of various penological justifications for life-without-parole sentences expressly was premised on the fact that Graham had not committed murder. *Id.*, 130 S. Ct. at 2028-30. Here, of course, petitioner has. Thus, *Graham* does not require, as petitioner would have it, that the *potential* juveniles might have as a general matter to grow and change outweighs, in every single instance, the *known* "severity and irrevocability[ ]" of death that they have inflicted on their victims. *Kennedy*, 554 U.S. at 438 (citation and quotations omitted).

In the case of a homicide offender, a life-without-parole sentence is not "grossly disproportionate in light of the justification[s] offered[ ]" for it, particularly in light of the deference normally accorded legislatures to choose among those justifications. *Graham*, 130 S. Ct. at 2029. Retribution is a legitimate reason to severely punish a murderer – one who has committed the worst crime and is highly culpable. The community is entitled "to express [its] moral outrage[,]" "right the balance for the wrong to the victim," *Roper*, 543 U.S. at 571, and "preserv[e] the possibility that [the offender] and the system will find

ways to allow him to understand the enormity of his offense[,]" *Kennedy*, 554 U.S. at 447, with a life-without-parole sentence. Here, in contrast to the nonhomicide offenders at issue in *Graham*, 130 S. Ct. at 2028, retribution *does* "justify imposing the second most severe penalty" on a juvenile-homicide offender.

Both *Graham* and *Roper* recognized that deterrence can have some effect on juveniles, even if it does not have as much as in the case of adults. In *Roper*, in particular, the Court observed that "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction[.]" 543 U.S. at 572. The crime deterred here is murder, and thus even minimal effectiveness is not trivial. And while petitioner asserts that deterrence has limited value because "far-future consequences are less meaningful" to adolescents, Pet. Br. at 36, the argument proves too much, as it would require the invalidation of any lengthy sentence for a 14-year-old offender, a result that *Graham* does not require. 130 S. Ct. at 2030, 2034 (allowing imposition of life sentence and possibility of imprisonment for life for juvenile-nonhomicide offenders). As it is, the small number of 14-year-old murderers suggests that the severe consequences attendant to committing murder has a general deterrent effect.

Finally, states should not be barred from concluding that a person such as petitioner, who has proven his willingness to commit an offense that only the

smallest fraction of both his peers (and adults for that matter) are willing to commit, is a threat to the community, warranting his exclusion from it. Petitioner protests that there is no foolproof way to determine whether juveniles such as himself will reoffend due to their undeveloped characters, and thus that incapacitation is not a permissible penological goal. Pet. Br. at 41 n.49. Insofar as the State is aware, there is no way to predict accurately whether *any* offender, juvenile or adult, is likely to reoffend. *See, e.g.*, Wagdy Loza, "Predicting Violent and Nonviolent Recidivism of Incarcerated Male Offenders," 8 Aggressive and Violent Behavior 175, 176 (2003). Incapacitation guarantees, however, that an offender will not reoffend, and states are entitled to choose that guarantee. In sum, society is entitled to conclude that those such as petitioner who have committed "the worst of crimes[,]" *Kennedy*, 554 U.S. at 447, can be treated, on at least some occasions, as the next-to-worst offenders.

4. Petitioner's Proposed Rule

Having focused much of his argument and all of his rarity data on 13- and 14-year-olds, petitioner nonetheless ends his argument with a muddled prayer for relief, alternatively suggesting that a categorical ban on life-without-parole sentences "could properly be drawn" at 18, "between 14 and 15[,]" or "between 15 and 16." Pet. Br. at 61-62. The Court should not entertain drawing the line at any age other than 14, if for no other reason than that

petitioner intentionally limited the questions presented in his certiorari petition to 14-year-olds. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Here, the petition for writ of certiorari raised three questions, all of which pertained to 14-year-old-homicide offenders. Petition for Writ of Certiorari at i. Not only were the questions limited to 14-year-olds, but the petition itself criticized the Arkansas Supreme Court for "mischaracteriz[ing] the central issue in this case. [Petitioner]'s Eighth Amendment claim pertains only to whether fourteen-year-old children must be exempted from the penultimate punishment[.]" *Id.*, at 17 (citation omitted).

The availability of life imprisonment without parole for 15-, 16-, and 17-year-olds cannot "fairly" be said to be included in questions intentionally narrowly drawn to apply only to 14-year-olds, and thus there is a "heavy presumption" against the Court's consideration of the former. *Yee v. Escondido*, 503 U.S. 519, 537 (1992). Although this presumption can be overcome in "the most exceptional cases[,]" *id.*, at 535 (citation and quotation omitted), this is not one of them, given that petitioner was 14 years old at the time he committed his offenses, that, by his own admission, he has not presented proof of an alleged lack of consensus for anyone other than 14-year-olds, *see* Pet. Br. at 62 (noting the lack of "precise data regarding the comparable figure[s] for older adolescents[ ]"), and that the Court as a general matter is

not well equipped to divine a line from the three alternatives he has set before it. *See, e.g.*, *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion) (refusing to "draw a line" for death penalty at 18 when question presented was whether it could be imposed on a 15-year-old because Court's task was "to decide the case before us[ ]").

Having failed to make the case to ban life-without-parole sentences for 14-year-old-homicide offenders, petitioner makes an even less convincing argument with regard to older juvenile offenders. Other than pointing out that such offenders are not adults in many contexts, he presents no evidence of legislative consensus or sentencing practices, yet those provide the Court with the "essential instruction" for it to exercise its independent judgment. There is, of course, no legislative consensus, in light of the overwhelming majority of jurisdictions that authorize life without parole even for 14-year-olds. And, what little evidence there is available shows that the imposition of life-without-parole sentences on juvenile-homicide offenders as a class is not rare by any measure. According to Human Rights Watch, as of October 2009, before *Graham* was decided, there were 2,589 offenders nationwide serving life without parole for offenses committed when they were juveniles. Human Rights Watch, "State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)" (Oct. 2009), available at http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (accessed Jan. 26,

2012). *Graham* identified approximately 123 of those as nonhomicide offenders. 130 S. Ct. at 2024. There are thus over 2,400 juvenile-homicide offenders serving life without parole – easily enough to show the absence of a societal consensus against that punishment. Even if this Court were to conclude – wrongly, the State submits – that the Eighth Amendment prohibits the states from sentencing 14-year-old murderers to life without parole, petitioner manifestly has failed to meet his burden of showing that states may not impose that sentence upon 15-, 16-, and 17-year-old murderers.

II. The Allegedly Mandatory Nature Of Petitioner's Sentence Does Not Render It Constitutionally Disproportionate, Assuming That The Court Addresses The Issue.

Although it is one of his three questions presented, petitioner does not address his alternative claim that his life-without-parole sentence is unconstitutional because it allegedly was mandatory. Because petitioner's brief fails to address the claim, it is abandoned and the Court should not consider it. *See, e.g.*, *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994). This claim also fails because petitioner's sentence was not mandatory. Under Arkansas law, offenders are sentenced in accordance with statutes in effect at the time that they committed their crimes. *E.g.*, *State v. Stephenson*, 340 Ark. 229, 232, 9 S.W.3d 495, 496 (2000). When petitioner committed his crimes, Ark. Code Ann. § 12-28-403(b)(1)

(Repl. 1999) (repealed by Ark. Acts 2001, No. 559, § 4) authorized "the sentencing authority" to sentence "a youthful male offender" under 18 to the Department of Correction, suspend the sentence, and commit the youth to the appropriate division of the Department of Human Services. If the youth successfully completed the training-school program, the youth could be returned to court and placed on probation. *Id.*, at (b)(2). On its face, this provision applied to "[a]ll youthful male offenders[,]" *id.*, at (a), meaning that it was available to offenders such as petitioner.

A similar provision is in effect now, having been enacted in 2001, when the other provision was repealed. *See* Ark. Acts 2001, No. 559, § 8. The new provision excludes juveniles such as petitioner who previously have been sent on more than one occasion to the Division of Youth Services of the Department of Human Services. Ark. Code Ann. § 5-4-104(f)(1) (Supp. 2011). The legislature's reenactment of the provision in 2001 makes clear its continued endorsement of that discretion, albeit not as broad as it once was. Because petitioner's sentence was not mandatory and the provision that made it discretionary was based upon the consideration of his age, the Court should not address his claim that his sentence is unconstitutional due to its allegedly being mandatory.

Should the Court nevertheless decide to treat the claim petitioner's counsel raises in the Brief for Petitioner in *Miller v. Alabama*, No. 10-9646, at 21-29, as being raised here, the claim fails. As an initial matter, petitioner provides no data whatsoever

indicating how many juveniles have been sentenced to a term of years when sentencers have been given the choice between such a sentence and life despite his bold assertion that they "almost always" choose the former. Miller Pet. Br. at 25. Yet, that is the data he needs to establish that life without parole is not imposed "proportion[ally] to the opportunities for its imposition[.]" *Graham*, 130 S. Ct. at 2025. The claim fares no better on the merits. Relying on *Graham* and *Roper*, petitioner contends that his sentence is constitutionally disproportionate because it was the only sentence available for his crime of capital murder, and thus was not imposed after the sentencer was permitted to consider whether his youth justified imposing some unspecified lesser sentence. Miller Pet. Br. at 26-27. He proposes that *Graham* and *Roper* mandate, as a constitutional matter, that states provide for consideration of aggravating and mitigating circumstances in "a discretionary sentencing procedure" before a sentence of life without parole may be imposed on a juvenile-homicide offender. Miller Pet. Br. at 26-28. This argument is misguided.[7]

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[7] As part of this claim, petitioner states that his older co-defendants received lesser sentences, despite facts demonstrating that they were equally or more culpable, and asks the Court to draw the inference that he was punished more harshly due to his age. Miller Pet. Br. at 28 n.34. He is wrong. The triggerman in petitioner's case, Derrick Shields, who also was 14 at the time of the crimes, is serving life without parole for his capital-murder conviction. *Shields*, 357 Ark. at 285, 166 S.W.3d at 30. Petitioner's first cousin, Travis Booker, who turned 15 one day

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Outside of the death-penalty context, this Court has never required individualized sentencing. Indeed, in *Harmelin*, the Court expressly refused to extend individualized sentencing beyond death-penalty cases. The Court explained that consideration of aggravating and mitigating factors is required in death-penalty cases "because of the qualitative difference between death and all other penalties." 501 U.S. at 995. For that reason, the Court held, "a sentence which is not otherwise cruel and unusual [does not] become[] so simply because it is 'mandatory.'" *Id.* *Graham* and *Roper* provide no basis for disregarding *Harmelin*'s drawing the line for individualized sentencing at death-penalty cases.

And while petitioner limits his argument on this point to mandatory life-without-parole-homicide offenders, it is hard to discern a limiting principle to his claim. If *Roper* and *Graham* mean, as he says, that juveniles *always* are less culpable than adults, Miller Pet. Br. at 26, then they never should be required to serve the same sentence as an adult for the same crime or at least not the same mandatory one, irrespective of what the sentence is. Surely the Eighth Amendment does not require this.

Requiring the states to engage in individualized sentencing outside of death-penalty cases would not

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before their crimes, was sentenced to 35 years' imprisonment, which he is still serving, after accepting a plea deal and testifying against petitioner. (TR 236-37)

only be an extraordinary departure from precedent and longstanding tradition, it also would be contrary to the very decisions upon which petitioner rests his claim, *Graham* and *Roper*. In both decisions, the Court rejected the states' contention that case-by-case sentencing adequately addressed the Court's constitutional concerns. Instead, the Court held that individual sentencers are unable accurately to account for youth when imposing death on murderers or life without parole on nonmurderers. *Graham*, 130 S. Ct. at 2031-32; *Roper*, 543 U.S. at 572-73. Although he relies on *Graham* and *Roper*, petitioner has offered no reason for the Court to conclude that individualized sentencing would be of greater utility here than it was in those cases.

To mandate such a sentencing scheme, moreover, is unnecessary to account for the relevance of youth recognized in *Graham* and *Roper*. Although youth need not be assessed by a sentencer at the time that a sentence of life without parole is imposed on a juvenile murderer, youth otherwise is and can be considered in the process. Pre-conviction, juveniles' special status is taken into account both by the federal government and the majority of the states. *See generally* Patrick Griffin et al., "Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting," at 4-7, National Report Series Bulletin (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention, Sept. 2011). Under Arkansas law, for example, prosecutors have the discretion to prosecute 14-year-olds as adults when they are alleged to have

committed the following seven offenses: capital and first-degree murder, kidnapping, aggravated robbery, rape, first-degree battery, and terroristic act. Ark. Code Ann. § 9-27-318(c)(2) (Repl. 2009). Even then, the juvenile can move to have the case transferred to juvenile court, with the juvenile's level of culpability being one of the considerations, *id.*, at § 9-27-318(e) and (g)(4), and can appeal the lower court's refusal to transfer the case, *id.*, at § 9-27-318(*l*), just as petitioner did here. Before petitioner's case went to trial, there was a focused and detailed examination of the impact of his youth, providing far greater consideration of it than other defendants normally would get of evidence that might mitigate their culpability. And while the Court in *Graham* found the existence of such statutes insufficient to override the concerns that prompted it to impose a categorical ban on sentencing juvenile-nonhomicide offenders to life without parole, 130 S. Ct. at 2031, those statutes are directly relevant to – and strongly militate against – petitioner's request that the Court create a new constitutional rule requiring individualized sentencing during which the offender's youth is taken into account.

Youth also can be taken into account post-conviction. Even though life imprisonment without the possibility of parole is not a categorically disproportionate sentence for juvenile-homicide offenders, as it was in *Graham*, juvenile-homicide offenders remain free to argue, on a case-by-case basis, that their sentences are grossly disproportionate under

the narrow-proportionality principle traditionally applied to noncapital sentences. *See, e.g.*, *Ewing*, 538 U.S. at 20 (plurality opinion); *Solem*, 463 U.S. at 288-90. That analysis begins with a threshold consideration of the gravity of the offense and the severity of the sentence, followed by a subsequent comparative analysis if that threshold judgment leads to an inference of gross disproportionality. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment); *see also Ewing*, 538 U.S. at 23-24 (plurality opinion) (treating Justice Kennedy's opinion in *Harmelin* as controlling). If that subsequent comparative analysis validates the threshold judgment, an Eighth Amendment challenge will prevail. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

Youth and other allegedly mitigating evidence can be taken into account as part of the threshold consideration when applying the gross-disproportionality analysis, just as the Court has considered other characteristics of individual offenders when applying the test, including "the culpability of the offender." *Solem*, 463 U.S. at 292; *see also, e.g.*, *Graham*, 130 S. Ct. at 2039-40 (Roberts, C.J., concurring in the judgment); *Ewing*, 538 U.S. at 29-30 (plurality opinion) (considering "long history of felony recidivism"). While the Court has stated that "successful challenges" to noncapital sentences will be "exceedingly rare[]" under the gross-disproportionality test, *Rummel v. Estelle*, 445 U.S. 263, 272 (1980), that is as it should be in light of this Court's stated refusal

to "sit as a 'superlegislature' to second-guess" the states' "difficult policy choices" in this area. *Ewing*, 538 U.S. at 28 (plurality opinion). Because the criminal-justice system already provides for adequate consideration of juvenile-homicide-offenders' youth, the Court need not use the Eighth Amendment to impose on the states, for the first time, individualized sentencing schemes to duplicate that effort.

III. Petitioner's Sentence Of Life Imprisonment Without Parole Is Not Disproportionate For His Commission Of A Homicide Even Though He Was Not The Triggerman.

Petitioner's sentence is not rendered constitutionally disproportionate by virtue of the fact that he was not the triggerman, as he has not established a national consensus against imposing life without parole on such 14-year-old-felony murderers, *see* Appendices A & B, *infra*, and petitioner would be a death-eligible offender if he were an adult under this Court's precedents. In *Enmund v. Florida*, 458 U.S. 783, 801 (1982), the Court held that the death penalty could not be imposed upon an offender consistently with the Eighth Amendment absent proof that the offender "killed[,] . . . attempted to kill, [or] intended or contemplated that life would be taken[.]" Following that decision, in *Tison v. Arizona*, 481 U.S. 137, 158 (1987), the Court held that a nontriggerman felony murderer could receive the death penalty consistently with *Enmund* when the evidence showed the offender's "major participation in the felony committed, combined with reckless indifference to human

life[.]" 481 U.S. at 158. Those findings were established there by evidence of the Tison brothers' active involvement in the underlying felonies, physical presence during the activity culminating in the murders, and their subsequent flight. *Id.*, at 158; *cf. also Graham*, 130 S. Ct. at 2027 (stating that those who do not kill, intend to kill, or "foresee that life will be taken" are not murderers).

Petitioner falls on the *Tison* side of the culpability line and could be subject to the death penalty had he been an adult. For that reason, he should be subject to life without the possibility for parole as a juvenile. He planned to rob a video store knowing one of his confederates had a shotgun and, when that confederate was leveling the shotgun at the store clerk who was hesitating to comply with demands for money, he entered the store to impress upon her that "We ain't playin'." And, after she was shot in the head, he did nothing to help, but instead fled with his two confederates. Such behavior is "every bit as shocking to the moral sense as an intent to kill." *Tison*, 481 U.S. at 157 (citation and quotations omitted). As a highly culpable juvenile-homicide offender, *see id.*, 481 U.S. at 157-58, petitioner is not entitled to the twice diminished moral culpability that *Graham* offers to such nonhomicide offenders, and he constitutionally can be subject to life imprisonment without the possibility of parole.

Petitioner does not appear to dispute that his participation in the robbery of the video store and Troup's death normally would put him high on the

culpability scale, but asserts that because "[j]uveniles as a group, and especially young adolescents like [him], have a significantly impaired ability to anticipate future consequences[,]" he is entitled to *Graham*'s twice diminished culpability rule. Pet. Br. at 65. He is wrong. Although couched as a punishment argument, petitioner's claim really appears to be that juveniles cannot be guilty of felony murder, which, the parties agree, is predicated on the foreseeability of violent injury to persons. The ability of the states to make such behavior by 14-year-olds criminal, however, cannot seriously be disputed, given the states' primary authority to define crimes. *See, e.g.*, *Payne*, 501 U.S. at 824.

Further, petitioner's own statement to the victim contradicts his claim that juveniles such as himself are incapable of knowing the dangers their actions pose. His threatening Troup that "We ain't playin'" demonstrates clearly that he appreciated the dangerous circumstance she was in and the consequences for her lack of cooperation and wanted to make sure that she, too, understood that. In the end, petitioner gets diminished culpability for his youth only once – a diminished culpability that makes him ineligible for the death penalty. Even *Graham* does not count that twice. The Eighth Amendment does not prohibit the State from sentencing petitioner to life without the possibility of parole for his having actively participated in an aggravated robbery during which someone was killed, and his claim to the contrary should be rejected.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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APPENDIX A

Jurisdictions that Authorize Life Without Parole for Nontriggerman-Juvenile-Felony Murderers

1.	Alabama	Ala. Code §§ 12-15-203, 13A-6-2(a)(3) & (c) (Michie Supp. 2011)
2.	Arizona	Ariz. Rev. Stat. § 13-501(B) (West Supp. 2011); Ariz. Rev. Stat. §§ 13-752, 13-1105(A)(2) & (D) (West 2010)
3.	Arkansas	Ark. Code Ann. § 5-10-101(a)(1) & (c)(1) (Supp. 2011); Ark. Code Ann. § 9-27-318(c) (Repl. 2009)
4.	California	Cal. Penal Code § 189 (West Supp. 2012); Cal. Penal Code §§ 190.2(a)(17), (c), & (d), 190.5(b) (West 2008)
5.	Delaware	10 Del. Code § 1010 (Michie Supp. 2010); 11 Del. Code §§ 636, 4209 (Michie Repl. 2007 & Supp. 2010); *Comer v. State*, 977 A.2d 334, 343-44 (Del. Supr. 2009) (addressing nontriggerman)
6.	Florida	F.S.A. § 777.011 (West 2010); F.S.A. § 985.56 (West 2006); F.S.A. §§ 775.082, 782.04 (West Supp. 2012); *Hodge v. State*, 970 So. 2d 923, 926-27 (Fla. App. 4 Dist. 2008)

7.	Georgia	Ga. Code Ann. § 15-11-28(b)(2) (Lexis Supp. 2011); Ga. Code Ann. §§ 16-2-20, 16-5-1 (Lexis 2011)
8.	Idaho	Idaho Code §§ 18-4003(d), 18-4004 (Michie 2004); Idaho Code § 20-509(1)(a) & (3) (Michie Supp. 2011); *State v. Pina*, 149 Idaho 140, 146-47, 233 P.3d 71, 77-78 (2010) (overruled on other grounds) (addressing nontriggerman)
9.	Illinois	705 Ill. Comp. Stat. § 405/5-130(4) (West Supp. 2011); 730 Ill. Comp. Stat. § 5/5-8-1(West Supp. 2011); 720 Ill. Comp. Stat. § 5/9-1(a)(3) (West Supp. 2011); 720 Ill. Comp. Stat. §§ 5/2-8, 5/5-1 (West 2002); 720 Ill. Comp. Stat. § 5/5-2 (West Supp. 2011)
10.	Indiana	Ind. Code §§ 35-41-2-4, 35-42-1-1, 35-50-2-3(b)(2) (Repl. 2009); *Williams v. State*, 706 N.E.2d 149, 157 (Ind. 1999) (addressing nontriggerman)
11.	Iowa	Iowa Code §§ 232.45(6), 702.11, 707.2(2) (West Supp. 2011); Iowa Code § 703.1 (West 2003); Iowa Code § 902.1 (West 2003) (amended by Iowa Acts 2011 S.F. 533 § 147, eff. July 27, 2011)

12. Louisiana	La. Child. Code Ann., art. 857(A) (Supp. 2012); La. Rev. Stat. § 14:24 (2007); La. Rev. Stat. § 14:30.1(A)(2) & (B) (Supp. 2012); *State v. Wiley*, 880 So. 2d 854, 863-65 (La. App. 5 Cir. 2004) (addressing nontriggerman)
13. Maryland	Md. Code Ann. Cts. & Jud. Pro. § 3-8A-03(d) (West Supp. 2008); Md. Code Ann. Cts. & Jud. Pro. § 3-8A-06(a)(2) (West 2002); Md. Code Ann. Crim. Law § 2-201(a)(4) & (b)(1) (West 2002); *Watkins v. State*, 357 Md. 258, 267, 744 A.2d 1, 6 (Md. 2000) (addressing nontriggerman)
14. Massachusetts	Mass. Gen. Laws Ch. 119 § 74 (West 2008); Mass Gen. Laws Ch. 265 §§ 1, 2 (West 2008); *Taylor v. Comm.*, 447 Mass. 49, 54-55, 849 N.E.2d 192, 196-97 (Mass. 2006) (addressing nontriggerman)
15. Michigan	Mich. Comp. Laws § 712A.4 (West 2002); Mich. Comp. Laws §§ 750.316, 791.234(6) (West Supp. 2011); *People v. Flowers*, 191 Mich. App. 169, 178-80, 477 N.W.2d 473, 478-79 (Mich. App. 1991) (addressing nontriggerman)

16. Mississippi	Miss. Code Ann. § 43-21-151(1)(a) & (3) (Lexis Supp. 2011); Miss. Code Ann. §§ 97-1-3, 97-3-19(2)(e), 97-3-21 (Lexis 2006); *Scarborough v. State*, 956 So. 2d 382, 385-87 (Miss. App. 2007) (addressing nontriggerman)
17. Nebraska	Neb. Rev. Stat. §§ 28-105, 29-2204 (Lexis Supp. 2011); Neb. Rev. Stat. § 28-303 (Lexis Repl. 2009); Neb. Rev. Stat. §§ 43-247, 43-276 (Lexis Repl. 2011); *State v. Aldaco*, 271 Neb. 160, 169-70, 710 N.W.2d 101, 109-10 (2006) (addressing nontriggerman)
18. Nevada	Nev. Rev. Stat. §§ 62B.330(3)(a), 200.030 (West Supp. 2011); Nev. Rev. Stat. § 195.020 (West 2000)
19. New Hampshire	N.H. Rev. Stat. §§ 626:8, 628:1, 630:1-a (Repl. 2007)
20. North Carolina	N.C. Gen. Stat. § 14-5.2 (West 2000); N.C. Gen. Stat. § 14-17 (West Supp. 2010); N.C. Gen. Stat. § 7B-2200 (West 2004); *State v. Roseborough*, 344 N.C. 121, 128, 472 S.E.2d 763, 767-68 (1996) (addressing nontriggerman)
21. North Dakota	N.D. Cent. Code §§ 12.1-04-01, 12.1-16-01, 12.1-32-01 (Michie Repl. 1997); N.D. Cent. Code § 27-20-34 (Michie Supp. 2011)

22. Ohio	Ohio Rev. Code Ann. § 2152.10 (Repl. 2011); Ohio Rev. Code Ann. §§ 2903.01, 2903.02, 2929.02 (Repl. 2010); *State v. Greer*, 39 Ohio St. 3d 236, 247, 530 N.E.2d 382, 396-97 (1988) (addressing nontriggerman)
23. Oklahoma	Okla. Stat. Title 21 §§ 701.7(B), 701.9 (West Supp. 2012); Okla. Stat. Title 10A §§ 2-5-101, 2-5-205, 2-5-208 (West 2009)
24. Pennsylvania	18 Pa. C.S.A. §§ 306, 2502 (1998); 18 Pa. C.S.A. § 1102 (Supp. 2011); 61 Pa. C.S.A. § 6137(a) (Supp. 2011); 42 Pa. C.S.A. § 6355(a) & (e) (2000)
25. Rhode Island	R.I. Gen. Stat. §§ 11-1-3, 11-23-2, 14-1-7 (Lexis 2002); R.I. Gen. Stat. § 11-23-1 (Lexis Supp. 2011); *In re Leon*, 122 R.I. 548, 554-55, 410 A.2d 121, 125 (1980) (addressing nontriggerman)
26. South Carolina	S.C. Code Ann. §§ 16-1-40, 16-3-10 (West 2003); S.C. Code Ann. § 63-19-1210(5) (West 2010); S.C. Code Ann. § 16-3-20 (West Supp. 2011); *State v. Avery*, 333 S.C. 284, 294, 509 S.E.2d 476, 481 (1998) (addressing nontriggerman)

27. South Dakota	S.D. Codified Laws §§ 22-3-1, 22-3-3, 22-6-1, 22-16-4, 22-16-12 (West 2006); S.D. Codified Laws §§ 24-15-4, 26-11-4 (West 2004)
28. Tennessee	Tenn. Code Ann. § 37-1-134 (Lexis Supp. 2011); Tenn. Code Ann. § 39-13-202 (Lexis Repl. 2010); *State v. Hinton*, 42 S.W.3d 113, 119 (Tenn. Crim. App. 2000) (addressing nontriggerman)
29. Vermont	Vt. Stat. Ann. Title 13 §§ 3, 2301, 2303 (Lexis 2009); Vt. Stat. Ann. Title 33 §§ 5102(2)(C), 5204 (Lexis Supp. 2011)
30. Washington	Rev. Code Wash. Ann. § 9A.32.030 (2009); Rev. Code Wash. Ann. §§ 10.95.020(11), 10.95.030, 13.40.110(1) (Supp. 2012)
31. West Virginia	W. Va. Code § 49-5-10(d)(1) (Lexis Repl. 2004); W. Va. Code §§ 61-2-1, 61-11-7, 62-3-15 (Lexis Repl. 2005)
32. Wyoming	Wyo. Stat. Ann. §§ 6-1-201, 6-2-101, 14-6-203 (Lexis 2011); *Jansen v. State*, 892 P.2d 1131, 1134 (Wyo. 1995) (addressing nontriggerman)

33.	Federal	18 U.S.C. §§ 1111, 5032 (2006); *United States v. Garcia-Ortiz*, 528 F.3d 74, 81-82 (1st Cir. 2008) (addressing nontriggerman)

APPENDIX B

Jurisdictions that Authorize Life Without Parole for 14-Year-Old Felony Murderers

1.	Alabama	Ala. Code §§ 12-15-203, 13A-6-2(a)(3) & (c) (Michie Supp. 2011)
2.	Arizona	Ariz. Rev. Stat. § 13-501(B) (West Supp. 2011); Ariz. Rev. Stat. § 13-752 (West 2010); Ariz. Rev. Stat. §13-1105(A)(2) & (D) (West 2010)
3.	Arkansas	Ark. Code Ann. § 9-27-318(c) (Repl. 2009); Ark. Code Ann. § 5-10-101(a)(1)& (c)(1) (Supp. 2011)
4.	Delaware	10 Del. Code § 1010 (Michie Supp. 2010); 11 Del. Code §§ 636, 4209 (Michie Repl. 2007 & Supp. 2010)
5.	Florida	F.S.A. § 985.56 (West 2006); F.S.A. §§ 775.082, 782.04 (West Supp. 2012);
6.	Georgia	Ga. Code Ann. § 15-11-28(b)(2) (Lexis Supp. 2011); Ga. Code Ann. §§ 16-3-1, 16-5-1 (Lexis 2011)
7.	Idaho	Idaho Code §§ 18-4003(d), 18-4004 (Michie 2004); Idaho Code § 20-509(1)(a) & (3) (Michie Supp. 2011)

8.	Illinois	730 Ill. Comp. Stat. § 5/5-8-1 (West Supp. 2011); 705 Ill. Comp. Stat. § 405/5-130(4)(c)(ii) (West Supp. 2011); 720 Ill. Comp. Stat. §5/9-1(a)(3) (West Supp. 2011); *People v. Cooks*, 271 Ill. App. 3d 25,40-42, 648 N.E.2d 190, 200-01 (Ill. App. 1 Dist. 1995)
9.	Iowa	Iowa Code §§ 232.45(6), 702.11, 707.2(2) (West Supp. 2011); Iowa Code § 902.1 (West 2003) (amended by Iowa Acts 2011 S.F. 533 § 147, eff. July 27, 2011)
10.	Maryland	Md. Code Ann. Cts. & Jud. Pro. § 3-8A-03(d) (West Supp. 2008); Md. Code Ann. Cts. & Jud. Pro. § 3-8A-06(a)(2) (West 2002); Md. Code Ann. Crim. Law § 2-201(a)(4) & (b)(1) (West 2002)
11.	Massachusetts	Mass. Gen. Laws Ch. 119 § 74 (West 2008); Mass Gen. Laws Ch. 265 §§ 1 & 2 (West 2008)
12.	Michigan	Mich. Comp. Laws § 712A.4 (West 2002); Mich. Comp. Laws § 750.316, 791.234(6) (West Supp. 2011)
13.	Mississippi	Miss. Code Ann. § 43-21-151(1)(a) & (3) (Lexis Supp. 2011); Miss. Code Ann. §§ 97-3-19(2)(e), 97-3-21 (Lexis 2006)

14. Nebraska	Neb. Rev. Stat. §§ 28-105, 29-2204 (Lexis Supp. 2011); Neb. Rev. Stat. § 28-303 (Lexis Repl. 2009); Neb. Rev. Stat. §§ 43-247, 43-276 (Lexis Repl. 2011)
15. Nevada	Nev. Rev. Stat. §§ 62B.330(3)(a), 200.030 (West Supp. 2011)
16. New Hampshire	N.H. Rev. Stat. §§ 628:1, 630:1-a (Repl. 2007)
17. North Carolina	N.C. Gen. Stat. § 14-17 (West Supp. 2010); N.C. Gen. Stat. § 7B-2200 (West 2004)
18. North Dakota	N.D. Cent. Code §§ 12.1-04-01, 12.1-16-01, 12.1-32-01 (Michie Repl. 1997); N.D. Cent. Code § 27-20-34 (Michie Supp. 2011)
19. Ohio	Ohio Rev. Code Ann. § 2152.10 (Repl. 2011); Ohio Rev. Code Ann. §§ 2903.01, 2903.02, 2929.02 (Repl. 2010)
20. Oklahoma	Okla. Stat. Title 21 §§ 701.7(B), 701.9 (West Supp. 2012); Okla. Stat. Title 10A §§ 2-5-101, 2-5-205, 2-5-208 (West 2009)
21. Pennsylvania	18 Pa. C.S.A. § 1102 (Supp. 2011); 18 Pa. C.S.A. § 2502 (1998); 61 Pa. C.S.A. § 6137(a) (Supp. 2011); 42 Pa. C.S.A. § 6355(a) & (e) (2000)

22. Rhode Island	R.I. Gen. Stat. §§ 11-23-2, 14-1-7 (Lexis 2002); R.I. Gen. Stat. § 11-23-1 (Lexis Supp. 2011)
23. South Carolina	S.C. Code Ann. § 63-19-1210(5) (West 2010); S.C. Code Ann. § 16-3-10 (West 2003); S.C. Code Ann. § 16-3-20 (West Supp. 2011)
24. South Dakota	S.D. Codified Laws §§ 22-3-1, 22-6-1, 22-16-4, 22-16-12 (West 2006); S.D. Codified Laws §§ 24-15-4, 26-11-4 (West 2004)
25. Tennessee	Tenn. Code Ann. § 37-1-134 (Lexis Supp. 2011); Tenn. Code Ann. § 39-13-202 (Lexis Repl. 2010)
26. Utah	Utah Code Ann. §§ 76-3-206, 76-3-207.7, 76-5-202(1)(d), 78A-6-602 (Supp. 2011)
27. Vermont	Vt. Stat. Ann. Title 13 §§ 2301, 2303 (Lexis 2009); Vt. Stat. Ann. Title 33 §§ 5102(2)(C), 5204 (Lexis Supp. 2011)
28. Virginia	Va. Code Ann. § 16.1-269.1 (Repl. 2010); Va. Code Ann. §§ 18.2-31(4), 19.2-264.4 (Supp. 2011)
29. Washington	Rev. Code Wash. Ann. §§10.95.020(11), 10.95.030, 13.40.110(1) (Supp. 2012)

30.	West Virginia	W. Va. Code § 49-5-10(d)(1) (Lexis Repl. 2004); W. Va. Code §§ 61-2-1, 62-3-15 (Lexis Repl. 2005)
31.	Wyoming	Wyo. Stat. Ann. §§ 6-2-101, 14-6-203 (Lexis 2011)
32.	Federal	18 U.S.C. §§ 1111, 5032 (2006)

APPENDIX C

Jurisdictions with Mandatory Sentence of Life Without Parole for 14-Year-Olds for at Least One Homicide Offense

1.	Alabama	Ala. Code §§ 12-15-203, 13A-6-2(c) (Michie Supp. 2011)
2.	Arizona	Ariz. Rev. Stat. § 41-1604.09(I) (West 2011); Ariz. Rev. Stat. § 13-501(B) (West Supp. 2011); Ariz. Rev. Stat. § 13-1105(A)(2) & (D) (West 2010)
3.	Arkansas	Ark. Code Ann. § 5-10-101(c)(1) (Supp. 2011); Ark. Code Ann. § 5-4-104(f) (Supp. 2011); Ark. Code Ann. § 9-27-318(c) (Repl. 2009)
4.	Connecticut	Conn. Gen. Stat. Ann. §§ 46b-127, 53a-35a (Supp. 2011); Conn. Gen. Stat. Ann. § 53a-54b (2007)
5.	Delaware	10 Del. Code § 1010 (Michie Supp. 2010); 11 Del. Code § 4209 (Michie Repl. 2007 & Supp. 2010)
6.	Florida	F.S.A. § 985.56 (West 2006); F.S.A. § 775.082 (West Supp. 2012)
7.	Hawaii	Haw. Rev. Stat. § 571-22(b) & (d) (2006); Haw. Rev. Stat. § 706-656 (Supp. 2008)
8.	Idaho	Idaho Code § 18-4004 (Michie 2004); Idaho Code § 20-509(1) (Michie Supp. 2011)

9.	Illinois	730 Ill. Comp. Stat. § 5/5-8-1 (West Supp. 2011); 705 Ill. Comp. Stat. § 405/5-130(4)(a) (West Supp. 2011)
10.	Iowa	Iowa Code § 232.45 (West Supp. 2011); Iowa Code § 902.1 (West 2003) (amended by Iowa Acts 2011 S.F. 533 § 147, eff. July 27, 2011)
11.	Massachusetts	Mass. Gen. Laws Ch. 119 § 74 (West 2008); Mass. Gen. Laws Ch. 265 § 2 (West 2008)
12.	Michigan	Mich. Comp. Laws §§ 712A.2, 712A.4 (West 2002); Mich. Comp. Laws § 791.234(6) (West Supp. 2011)
13.	Minnesota	Minn. Stat. Ann. § 260B.125 (West Supp. 2012); Minn. Stat. Ann. § 609.106(Subd. 2) (West 2009)
14.	Mississippi	Miss. Code Ann. § 43-21-151(1)(a) & (3) (Lexis Supp. 2011); Miss. Code Ann. § 97-3-21 (Lexis 2006); Miss. Code Ann. § 99-19-101 (Lexis 2007); Miss. Code Ann. § 47-7-3(1)(f) (Lexis 2011)
15.	Missouri	Mo. Rev. Stat. § 211.071 (2010); Mo. Rev. Stat. § 565.020 (1999)
16.	Nebraska	Neb. Rev. Stat. §§ 28-105, 28-303 (Lexis Repl. 2009); Neb. Rev. Stat. § 29-2204 (Lexis Supp. 2011); Neb. Rev. Stat. § 43-247 (Lexis Repl. 2011)

17. New Hampshire	N.H. Rev. Stat. §§ 628:1(II), 630:1-a(III) (Repl. 2007)
18. New Jersey	N.J. Stat. Ann. § 2C:11-3(b) (Supp. 2011); N.J. Stat. Ann. § 2A:4A-26 (2011)
19. North Carolina	N.C. Gen. Stat. § 14-17 (West Supp. 2010); N.C. Gen. Stat. § 7B-2200 (West 2004)
20. Ohio	Ohio Rev. Code Ann. § 2152.10 (Repl. 2011); Ohio Rev. Code Ann. §§ 2929.02(B)(3), 2929.03(E)(2) (Repl. 2010)
21. Pennsylvania	18 Pa. C.S.A. § 1102 (Supp. 2011); 61 Pa. C.S.A. § 6137(a) (Supp. 2011); 42 Pa. C.S.A. § 6355(a) & (e) (2000)
22. South Dakota	S.D. Codified Laws §§ 22-6-1, 22-16-12 (West 2006); S.D. Codified Laws §§ 24-15-4, 26-11-4 (West 2004)
23. Vermont	Vt. Stat. Ann. Title 13 § 2311(c) (Lexis 2009); Vt. Stat. Ann. Title 33 §§ 5102(2)(C), 5204 (Lexis Supp. 2011)
24. Virginia	Va. Code Ann. § 16.1-269.1 (Repl. 2010); Va. Code Ann. § 18.2-10 (Repl. 2009); Va. Code Ann. § 19.2-264.4 (Supp. 2011)
25. Washington	Rev. Code Wash. Ann. §§ 10.95.030, 13.40.110(1) (Supp. 2012)

26. Wyoming	Wyo. Stat. Ann. §§ 6-2-101, 6-10-301(c), 14-6-203 (Lexis 2011)
27. Federal	18 U.S.C. §§ 1111, 5032 (2006)

REPLY BRIEF

No. 10-9647

In The
Supreme Court of the United States

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arkansas

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

1. **The Facts Regarding Kuntrell Jackson's Degree of Crime and Culpability** 1

2. **The Facts Regarding the Extraordinary Rarity of Life-Without-Parole Sentences for Children 14 and Under** 2

3. **The Facts Regarding Kuntrell Jackson's Mandatory Sentence** 10

4. **The Problems with the State's Defense of Kuntrell's Mandatory Life-Without-Parole Sentence** 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 7

Coker v. Georgia, 433 U.S. 584 (1977) 8

Eddings v. Oklahoma, 455 U.S. 104 (1982).....15

Graham v. Florida, 130 S. Ct. 2011 (2010).....*passim*

Hunter v. State, 645 S.W.2d 954 (Ark. 1983).....13

Jackson v. State, 194 S.W.3d 757 (Ark. 2004).....1, 2, 17

Roper v. Simmons, 543 U.S. 551 (2005).....*passim*

Tremble v. Burt, No. 06-CV-13945, 2010 WL 3488636 (E.D. Mich. Sept. 1, 2010).....5

STATUTES AND RULES

1969 Ark. Act No. 377, § 3 13

Ark. Code Ann. § 5-4-104.....11, 12

Ark. Code Ann. § 12-28-403.....11, 12, 13

Ark. Code Ann. § 16-97-101.....11

Ark. Stat. § 41-803.....13

Ark. Stat. § 46-910.....13

Ga. Code Ann. § 17-10-31 9

Md. Code Ann., Crim. Law § 2-202 9

U.S. Sup. Ct. R. 15.....10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Betty Adams, *Barton Honor Student Killed in Carjacking Incident on Sunday*, Daily World (Helena-West Helena, Ark.), Oct. 16, 1995 4

Betty Adams, *Fourth Suspect Apprehended in Bogan Murder*, Daily World (Helena-West Helena, Ark.), Oct. 18, 1995.....4

Betty Adams, *Four Suspects in Bogan Slaying Arraigned Friday*, Daily World (Helena-West Helena, Ark.), Oct. 29, 1995.....4

Betty Adams, *Ackward Given Two Life Sentences*, Daily World (Helena-West Helena, Ark.), May 21, 1996.....4

John Barnes, *A Life Sentence or Not? The Confusing Case of Cedric King*, Grand Rapids Press, Nov. 7, 2011 4

Capital Murder Trial Delayed Until June, Ark. Democrat-Gazette, May 23, 1996 4

Fed. Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reports for the United States* (1971–2010).....6

Four Teens Are Charged in Slaying Arkansas Youth, 14, Abducted Near Store, Dallas Morning News, Oct. 17, 1995 4

4th Teen Still Sought in Death of Boy, 14, Ark. Democrat-Gazette, Oct. 18, 1995.....4

TABLE OF AUTHORITIES – Continued

Page

4th Teen-Age Suspect Arrested in Killing of West Helena Boy, Ark. Democrat-Gazette, Oct. 19, 1995 4

Emmett George, *3 Held in Slaying of Boy, 14, Washing Car Before Church*, Ark. Democrat-Gazette, Oct. 17, 1995 4

Helena Youth Receives Two Life Sentences in 1995 Bogan Slaying, Daily World (Helena-West Helena, Ark.), May 25-26, 1996 4

Op. Ark. Att'y Gen. No. 83-137 (July 19, 1983) 13

Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, *Juvenile Arrests 2009* (2011) 9

1. The Facts Regarding Kuntrell Jackson's Degree of Crime and Culpability

Arkansas concedes that Kuntrell Jackson neither committed the homicidal act nor intended the death for which he has been sentenced to life imprisonment without possibility of parole. The State frames its second Question Presented as whether the "Eighth and Fourteenth Amendments . . . prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender who was not the triggerman *or shown to have intended the killing*, but who acted with reckless indifference to human life" (Ark. Resp't Br. i (emphasis added)). Even this characterization of the case overstates Kuntrell's culpability as found by the Arkansas Supreme Court. That Court affirmed his conviction and mandatory life-without-parole sentence solely on a finding that the jury could have concluded he "did, in fact, in some way solicit, command, induce, procure, counsel, or aid in the commission of the crime *sub judice*." *Jackson v. State*, 194 S.W.3d 757, 760 (Ark. 2004).[1] And this finding in turn rested

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[1] The Arkansas Supreme Court was explicit that the "indifference" element of capital murder was satisfied if either Kuntrell or the actual killer, Derrick Shields, was found to have possessed that mental state: "In order to convict the appellant of capital murder, the State had to prove that Jackson attempted to commit or committed an aggravated robbery and, in the course of that offense, he, *or an accomplice*, caused Ms. Troup's death under circumstance manifesting an extreme indifference to the value of human life." 194 S.W.3d at 760 (emphasis added).

critically on the way the jury may have resolved the contested "question of fact as to whether Jackson said 'We ain't playin'' or 'I thought you all was playin'' upon entering the store." *Id.* at 760.[1] Any constitutional analysis that "take[s] account of special difficulties . . . in juvenile representation . . . [which] . . . put [juveniles] . . . at a significant disadvantage in criminal proceedings" (*Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010)) must recognize the fallibility of a sentence of lifelong imprisonment imposed upon a 14-year-old boy whose conviction as an accessory to felony-murder rests ultimately on a jury's choice between variant accounts of three or six words the boy spoke, and upon the jury's possible interpretation of what those few words signified about his state of mind.

2. The Facts Regarding the Extraordinary Rarity of Life-Without-Parole Sentences for Children 14 and Under

The Brief for Petitioner stated that "the current total number of 13- and 14-year-old children serving sentences of life without parole [in the United States

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[1] "An earlier statement given by [co-defendant Travis] Booker reported that the appellant said, 'We ain't playin'.' However, at trial, Booker recanted, and both he and the appellant testified that Jackson said, 'I thought you all was playin'.' This court has held that it is within the province of the jury to accept or reject testimony as it sees fit." 194 S.W.3d at 760.

is] . . . 79 plus or minus one or two." Jackson Pet'r Br. 47 n.57. The reason for the marginal imprecision here is that there is conflicting information about a few of the individuals who may be in this group. We address these unclear cases in the following paragraph. They do nothing to change the picture. Significantly, the responsive briefs filed by Arkansas and Alabama, by nineteen other States and one Territory as *Amici* for Respondents, and by the National Association of District Attorneys – parties optimally situated and strongly motivated to contest the 79-plus-or-minus-two figure if it were contestable – only confirm its quintessential accuracy.[3]

Arkansas's brief suggests that that State may have identified one additional life-without-parole-sentenced individual in its prison system. Ark. Resp't Br. 19-20 n.5. Although it states that Willie Mitchell was 14 years old when his offense took place, local news coverage repeatedly and consistently reported

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[3] The briefs of the Respondent States and their *amici* also confirm the data provided at Jackson Pet'r Br. 49 regarding the number of jurisdictions that currently have children 14 or younger serving life-without-parole sentences. They do not identify any additional jurisdictions that have imposed these sentences and they do not challenge the fact that only a handful of jurisdictions have more than two or three such children serving life without parole.

him as being 15 at the time.[4] Michigan suggests that the Michigan Department of Corrections has identified two additional individuals. Mich. et al. *Amicus* Br. 18 n.11. Undersigned counsel has been informed that one of these individuals is Cedric King. The sentencing judge, the prosecuting attorney, and the Attorney General's Office have all publicly stated that Cedric King is parole-eligible.[5] The other individual

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[4] *See, e.g.*, Betty Adams, *Barton Honor Student Killed in Carjacking Incident on Sunday*, Daily World (Helena-West Helena, Ark.), Oct. 16, 1995, at 1 (stating Mr. Mitchell's age as 15); Emmett George, *3 Held in Slaying of Boy, 14, Washing Car Before Church*, Ark. Democrat-Gazette, Oct. 17, 1995, at 1A (same); *Four Teens Are Charged in Slaying Arkansas Youth, 14, Abducted Near Store*, Dallas Morning News, Oct. 17, 1995 (same); Betty Adams, *Fourth Suspect Apprehended in Bogan Murder*, Daily World (Helena-West Helena, Ark.), Oct. 18, 1995, at 1 (same); *4th Teen Still Sought in Death of Boy, 14*, Ark. Democrat-Gazette, Oct. 18, 1995, at 3B (same); *4th Teen-Age Suspect Arrested in Killing of West Helena Boy*, Ark. Democrat-Gazette, Oct. 19, 1995, at 2B (same); Betty Adams, *Four Suspects in Bogan Slaying Arraigned Friday*, Daily World (Helena-West Helena, Ark.), Oct. 29, 1995, at 1 (same); Betty Adams, *Ackward Given Two Life Sentences*, Daily World (Helena-West Helena, Ark.), May 21, 1996, at 1 (same); *Capital Murder Trial Delayed Until June*, Ark. Democrat-Gazette, May 23, 1996, at 12D (same); *Helena Youth Receives Two Life Sentences in 1995 Bogan Slaying*, Daily World (Helena-West Helena, Ark.), May 25-26, 1996, at 1 (same).

[5] John Barnes, *A Life Sentence or Not? The Confusing Case of Cedric King*, Grand Rapids Press, Nov. 7, 2011, *available at* http://www.mlive.com/news/grand-rapids/index.ssf/2011/11/a_life_sentence_or_not_the_con.html (explaining that the Michigan DOC has repeatedly misidentified Cedric King as someone serving life without parole, attaching a letter written by the sentencing judge to the DOC at the request of both prosecutor and defense counsel indicating that Mr. King is parole-eligible, and quoting Assistant

(Continued on following page)

identified by Michigan is T.J. Tremble. Tremble's conviction has been overturned by a federal court.[6]

Thus any factual dispute about the precise number of persons nationwide who are currently serving sentences of life without parole imposed for crimes at age 14 and under is very small, understandable, and insignificant. Whether the figure is 79 or 82 (the maximum number accruable from the data offered by Respondents and their *amici*), it is about two-thirds of the 123 non-homicide life-without-parole sentences that the Court considered in *Graham* before concluding that "[t]he sentencing practice now under consideration is exceedingly rare." 130 S. Ct. at 2026.

To be sure, *Graham* noted that over 380,000 juveniles had been arrested in 2007 for nonhomicide offenses. 130 S. Ct. at 2025. Arkansas and Alabama seize upon this figure[7] to argue that the "proportion of life-without-parole sentences imposed upon . . . [homicide offenders of 14 and under] is exponentially greater than the proportion the Court concluded demonstrated rarity in *Graham*." Ark. Resp't Br. 21;

Attorney General Peter Govorchin as agreeing that Mr. King is parole-eligible despite confusion on the point).

[6] *Tremble v. Burt*, No. 06-CV-13945, 2010 WL 3488636 (E.D. Mich. Sept. 1, 2010).

[7] The Court in *Graham* made far less of the figure than Respondents' mathematical manipulations do. The *Graham* Court carefully noted that "it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences." 130 S. Ct. at 2025.

see also Ala. Resp't Br. 31-32 ("[T]his case appears to differ from *Graham* by, quite literally, several orders of magnitude."). Their claim is that "[t]he relatively low incidence of 14-year-old-homicide offenders serving life-without-parole sentences reflects the low incidence of 14-year-old-homicide offenders generally, not an unwillingness to impose life sentences on them." Ark. Resp't Br. 20; *see also* Ala. Resp't Br. 1, 10, 31-33.

The parties are not in disagreement that homicides committed by children 14 and younger are relatively infrequent. *See* Jackson Pet'r Br. 54-57; *id.* at 54 (observing that "[h]omicides by young adolescents do not constitute a danger of such magnitude as to warrant their exclusion from the constitutional logic of *Roper* and *Graham*"). But their number nonetheless dwarfs the number of young teens serving life without parole for homicide who have accumulated in the Nation's prisons during the four decades since the earliest of them was given that sentence.[8] Between 1971 and 2010, according to the federal government's Uniform Crime Reports, 7,475 children 14 and younger were arrested for murder or nonnegligent manslaughter.[9] Yet only 79 – or at most 82 –

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[8] The earliest extant life-without-parole sentence was imposed in 1971. *See* Jackson Pet'r Br. 48 n.58.

[9] *See* Fed. Bureau of Investigation, U.S. Dep't of Justice, *Uniform Crime Reports for the United States*, Table 38 (2010), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl38.xls; *id.* (2009), http://www2.fbi.gov/ucr/cius2009/data/table_38.html; *id.* (2008), http://www2.fbi.gov/ucr/cius2008/data/table_38.html; *id.* (2007), http://www2.fbi.

(Continued on following page)

life-without-parole sentences are the product of these 40 years – a figure all the more telling "when one considers that a juvenile sentenced to life without parole is likely to live in prison for decades" (*Graham*, 130 S. Ct. at 2024).

This Court's decisions indicate that a proper Eighth Amendment analysis considers both the "absolute numbers" of individuals who have been given a challenged sentence (*id.* at 2024) and a "comparison . . . [of that number with] the opportunities for its imposition" (*id.* at 2025).[10] A very small absolute number suggests that the sentence is immunized from legislative reconsideration, responsive to contemporary standards of decency, only because its rarity makes

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gov/ucr/cius2007/data/table_38.html; *id.* (2006), http://www2.fbi.gov/ucr/cius2006/data/table_38.html; *id.* (2005), http://www2.fbi.gov/ucr/05cius/data/table_38.html; *id.* at 290 (2004), *available at* http://www.fbi.gov/about-us/cjis/ucr/ucr; *id.* at 280 (2003); *id.* at 244 (2002); *id.* (2001); *id.* at 226 (2000); *id.* at 222 (1999); *id.* at 220 (1998); *id.* at 232 (1997); *id.* at 224 (1996); *id.* at 218 (1995); *id.* at 227 (1994); *id.* (1993); *id.* (1992); *id.* at 223 (1991); *id.* at 184 (1990); *id.* at 182 (1989); *id.* at 178 (1988); *id.* at 174 (1987); *id.* (1986); *id.* (1985); *id.* at 172 (1984); *id.* at 179 (1983); *id.* at 176 (1982); *id.* at 171 (1981); *id.* at 200 (1980); *id.* at 196 (1979); *id.* at 194 (1978); *id.* at 180 (1977); *id.* at 181 (1976); *id.* at 188 (1975); *id.* at 186 (1974); *id.* at 128 (1973); *id.* at 126 (1972); *id.* at 122 (1971).

[10] In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court did not consider how many juveniles had potentially been exposed to the death penalty (*see id.* at 564-67); nor, in *Atkins v. Virginia*, 536 U.S. 304 (2002), did it consider how many mentally retarded offenders had been arrested for homicide (*see id.* at 313-16).

its recipients invisible. A relatively small comparative ratio suggests that sentencers are resistant to imposing it when they have a choice. Both data are relevant when the Court undertakes to review the constitutionality of a sentence which exists on the statute books of a significant number of jurisdictions but is almost never used in practice. And the second datum – the comparative ratio – is of particular importance only where sentencers *do* have a choice to impose the challenged sentence or withhold it.

For example, in *Coker v. Georgia*, 433 U.S. 584 (1977), the Court found it significant that "in the vast majority of cases, at least 9 out of 10, juries have not imposed the death sentence [for the crime of rape]" (*id.* at 597), but it cautioned that "[o]f course, the jury's judgment is meaningful only where the jury has an appropriate measure of choice as to whether the . . . [challenged] penalty is to be imposed" (*id.* at 596). In the present cases, it is uncontested that the overwhelming number of extant life-without-parole sentences imposed on children 14 and under were the product of mandatory sentencing regimes. Only eight children 14 and younger have been sentenced to life without parole where the sentencer had discretion to impose a lesser sentence.[11]

States which authorize discretionary life-without-parole sentences for young teens convicted of murder

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[11] *See* Miller Pet'r Br. 24 n.31.

but *never* impose such sentences in practice cannot plausibly be supposed to have lacked opportunities to do so. Many of these States have levels of violent juvenile crime which are similar to those in the States that have sentenced young adolescents to life without parole. For example, Georgia has a higher rate of juvenile arrests for violent crime than either of its fellow Southern states of Alabama and Arkansas.[12] But Georgia makes life-without-parole sentencing discretionary (*see* Ga. Code Ann. § 17-10-31) and has not sentenced a single child 14 or younger to life without parole. Similarly, Maryland has a higher rate of juvenile arrests for violent crime than either Pennsylvania or Florida.[13] But Maryland does not make a sentence of life without parole mandatory for juveniles convicted of homicide (*see* Md. Code Ann., Crim. Law § 2-202(b)(2)), and Maryland has not imposed life without parole on any child 14 or younger, while Pennsylvania and Florida have imposed the largest number of such sentences: – 18 and 13 respectively.

In short, it is both uncontested and constitutionally significant that our Nation, with a population exceeding 300,000,000, has accreted approximately 79 life-without-parole sentences for homicides by children 14 and under during a 40-year period. The arguments

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[12] *See* Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, *Juvenile Arrests 2009* 21 (2011), *available at* http://www.ojjdp.gov/pubs/236477.pdf.

[13] *See supra* note 12.

by which Respondents and their *amici* attempt to trivialize or dodge this fact are unconvincing.

3. The Facts Regarding Kuntrell Jackson's Mandatory Sentence

Arkansas's brief argues for the first time in the course of this litigation that Kuntrell Jackson's sentence was not mandatory.[14] That argument would have astounded the sentencing judge and all parties at every stage of the litigation prior to this Court's grant of certiorari. The sentencing judge unmistakably believed that a life-without-parole sentence for Kuntrell was mandatory; he exercised no discretion in determining Kuntrell's sentence because he understood that he had none. After the jury returned its guilty verdict, the judge consulted with counsel about how to proceed given that "there's only one sentence." J.A. 54. Both the State and defense counsel agreed

[14] Although Kuntrell challenged the mandatory nature of his sentence in both state courts below and in his petition for certiorari here, Arkansas has never previously disputed the predicate fact that his sentence *was* mandatory. *See* R. 105-09; Appellee's Br. 1-3, *Jackson v. Norris*, No. 09-145 (Ark. May 18, 2009); Appellee's Supplemental Br. 1-3, *Jackson v. Norris*, No. 09-145 (Ark. Sept. 19, 2010); Ark. Br. Opp. Cert. 1-6. Because the State failed to make any such claim in the lower courts or in a Brief in Opposition to Certiorari, this Court should not countenance it now. The last three sentences of the Court's Rule 15.2 explicitly and repeatedly admonish counsel that sandbagging of this kind is impermissible.

that, for this reason, there was no need for the jury to deliberate on sentencing, as is normally required in Arkansas. *See* Ark. Code Ann. § 16-97-101. The judge then dismissed the jury, stating "the Court would instruct you on punishment and ask you to retire to consider punishment. But in view of your verdict, there's only one possible punishment, and the Court will sentence on that." J.A. 55. Without further proceedings, the judge sentenced Kuntrell Jackson to life imprisonment without parole. J.A. 56.

Now, however, Arkansas points to § 12-28-403(b)(1) (1999) of the Arkansas Code in effect at the time of the offense, and argues that this provision authorized the trial court to sentence Kuntrell Jackson "to the Department of Correction, suspend the sentence, and commit the youth to the appropriate division of the Department of Human Services" to participate in a "training-school program" which could qualify him to be "placed on probation" (Ark. Resp't Br. 36-37). There are several grounds on which this argument could have been dismissed out of hand if the State had raised it in courts familiar with Arkansas law and practice.

Kuntrell's life-without-parole sentence was imposed under Ark. Code Ann. § 5-4-104(b) (1999) ("A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole."). Another subsection of the same statute then provided that: "No defendant convicted

of an offense shall be sentenced otherwise than in accordance with this chapter." Ark. Code Ann. § 5-4-104(a) (1999). The code section belatedly cited by the State is not part of the chapter on sentencing but is part of a chapter governing state correctional facilities. It can therefore properly be construed as concerned with the *location* of confinement rather than the *duration* of confinement.[15]

If construed as a duration-of-confinement provision in the way that the State now proposes, § 12-28-403(b)(1) conflicted with other Arkansas statutes which specifically prohibited both term-of-years sentences and suspended sentences for the offense of capital murder. *See* Ark. Code Ann. §§ 5-4-104(b), (e)(1)(A)(i) (1999).[16] And the resolution of that conflict would have been readily at hand for any Arkansas state court confronted with it. For § 12-28-403(b)(1) was probably no longer operative at the time of

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[15] This construction is especially plausible because the statute applies only to "youthful male offenders" (Ark. Code Ann. § 12-28-403) and there does not appear to be a comparable provision for youthful female offenders. It would be absurd to assume that the legislature made the sentence for capital murder discretionary for men but mandatory for women.

[16] Under the current version of § 5-4-104(f)(1), which contains a provision similar to former § 12-28-403, this conflict may create an open question of Arkansas law. The State's request that this Court address a statutory-construction issue which its attorneys never presented to the state courts below, in a way that could cast a shadow on the open question, is all the more improvident on that account.

Kuntrell Jackson's sentencing. Section 12-28-403 was originally enacted in 1969 and codified as Arkansas Statute § 46-910. 1969 Ark. Act No. 377, § 3. In *Hunter v. State*, 645 S.W.2d 954 (Ark. 1983), the Arkansas Supreme Court found a sentence imposed pursuant to § 46-910 invalid because it was not a disposition authorized by the applicable sentencing statutes. 645 S.W.2d at 956-57. Relying on this decision, the Arkansas Attorney General's Office issued an opinion that § 46-910 had been superseded by Arkansas Statute § 41-803 and other sentencing statutes then in effect. *See* Op. Ark. Att'y Gen. No. 83-137 (July 19, 1983). Section 41-803 was later recodified as Arkansas Code § 5-4-104, the sentencing statute in effect at the time of Kuntrell Jackson's offense. *See* Ark. Code Ann. § 5-4-104(b).

The State failed to present to the state courts below its present contention that § 12-28-403(b)(1) applied to Kuntrell's sentencing – with the farfetched consequence that the trial judge might have disposed of Kuntrell's capital murder conviction by suspending sentence, sending Kuntrell to a training school run by the Department of Human Services, and releasing Kuntrell on probation as soon as he completed his training. Ark. Resp't Br. 37.

That contention was unlikely to survive either legal or serious practical scrutiny.[17]

4. The Problems with the State's Defense of Kuntrell's Mandatory Life-Without-Parole Sentence

Because Kuntrell's life-without-parole sentence was mandatory, his sentencer was obliged to impose

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[17] The State also suggests that Kuntrell's brief in this Court fails to preserve his mandatory sentencing claim. Ark. Resp't Br. 36. Not so. Section H of the Brief for Petitioner ("The Constitutional Rule of *Graham* Would Be Stripped of Intelligible Meaning If It Were Held Inapplicable to the *Mandatory* Life-Without-Parole Sentence Imposed on 14-Year-Old Kuntrell Jackson for a Homicide Crime Attributed to Him Through Accessorial Felony-Murder Doctrines" (Jackson Pet'r Br. 63 (emphasis added))) argues both the second and third of Kuntrell's Questions Presented (at Jackson Pet'r Br. i). This section expressly advocates the position of the Arkansas Supreme Court dissenters (beginning "As the dissent below found. . . ." (Jackson Pet'r Br. 63)), which had been stated (at Jackson Pet'r Br. 4): "The dissenters emphasized that Kuntrell's role in the offense was 'no more, if not less than, Graham's involvement had been.' J.A. 88. They noted that Kuntrell's mandatory sentence did not take account of his young age or other mitigating circumstances, as *Graham* requires. J.A. 88." The rest of section H is devoted to summarizing the individual circumstances of Kuntrell's case which Arkansas's mandatory statute categorically excluded from consideration. Even willful blindness could not fail to see that – as Arkansas's lawyers themselves recognize (at Ark. Resp't Br. 38) – "petitioner contends that his sentence is constitutionally disproportionate because it was the only sentence available for his crime of capital murder, and thus was not imposed after his sentencer was permitted to consider whether his youth justified imposing some unspecified lesser sentence" (*id.*).

it in complete disregard of all of the features of youth that were central to the holdings in *Roper* and *Graham*. His young age was obligatorily excluded from the sentencing determination, not only in its own right but as the context for assessing the significance of each of those aspects of his life experience which were conditioned by his age.[18] "'[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'" *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). Mandatory life-without-parole for young teens inexorably banishes from the sentencing determination the entire constellation of age-dependent factors that *Roper* and *Graham* found to be indispensable considerations in aligning punishment with culpability.

Arkansas argues that a mandatory procedure for imposing life-without-parole sentences on juveniles is nonetheless consistent with *Roper* and *Graham* because those "offenders remain free to argue, on a case-by-case basis, that their sentences are grossly disproportionate under the narrow-proportionality principle traditionally applied to noncapital sentences." Ark. Resp't Br. 41-42. The implications of this

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[18] The particular circumstances of Kuntrell's young life which were thus foreclosed from consideration in the assessment of his culpability are summarized in his Petition for Writ of Certiorari at pages 4-5.

position are remarkable. Since the state-law rule dictated by a mandatory life-without-parole statute is, by definition, that every juvenile convicted of a life-without-parole-eligible offense *must* be sentenced to life without parole, *state* law can provide no guidelines, principles, or standards for consideration in individualized sentencing determinations. The constitutional law of the Eighth Amendment is thus made the front-line operating code for meting out juvenile homicide sentences, and this Court is made the effective guideline-setting and sentencing-review agency "on a case-by-case basis" in juvenile homicide prosecutions. That a *State* should propose a procedure so impractical and radically at odds with the first premises of federalism is an indication of how difficult Arkansas finds it to reconcile its mandatory juvenile-life-without-parole statute with *Roper* and *Graham*.

CONCLUSION

This case and the companion *Miller* case have been the subject of extensive briefing. To avoid unnecessary imposition on the Court, we have limited the reply briefs in both cases to discussing the very few points in the Respondents' Briefs which were not anticipated in the Briefs for the Petitioners.[19] Respondents have notably failed to counter Petitioners' initial submissions that the constitutional logic of *Roper* and *Graham* controls Kuntrell Jackson's case and requires invalidation of his sentence to lifelong incarceration.

Respectfully submitted,

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March 13, 2012

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[19] Some matters which are raised both in Arkansas's *Jackson* Brief and in Alabama's *Miller* brief but which are developed most fully in the latter are addressed in the Reply Brief in *Miller*.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 10-9646 & No. 10-9647

Supreme Court, U.S.
FILED
JAN 17 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EVAN MILLER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

KUNTRELL JACKSON,
Petitioner,
v.
STATE OF ARKANSAS,
Respondent.

On Writs of Certiorari to the Alabama Court of Criminal Appeals & Arkansas Supreme Court

BRIEF OF *AMICI CURIAE* J. LAWRENCE ABER, MARC S. ATKINS, CAMILLA P. BENBOW, MARY M. BRABECK, JANE C. CONOLEY, KENNETH A. DODGE, MICHELLE FINE, ADRIANA GALVÁN, MARGO GARDNER, CHARLES F. GEIER, FRANCES E. JENSEN, JACQUELINE MATTIS, PEDRO NOGUERA, BRUCE D. PERRY, AND VINCENT SCHMITHORST IN SUPPORT OF PETTTIONERS

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January 17, 2012

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of adolescents?

2. Does imposition of a mandatory sentence of life imprisonment without parole on a fourteen-year-old child convicted of homicide — a sentence imposed pursuant to a statutory scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances — violate the Eighth and Fourteenth Amendments' prohibition on cruel and unusual punishments?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 9

ARGUMENT 12

I. SCIENTIFIC RESEARCH POST-*ROPER* AND *GRAHAM* CONTINUES TO CONFIRM THAT ADOLESCENTS ARE BIOLOGICALLY LESS DEVELOPED AND CONSEQUENTLY LESS CULPABLE THAN ADULTS 12

A. Differences in Neurological Development Lead to Greater Vulnerability for Risky and Reward-Seeking Behavior in Adolescents 13

1. Post-*Graham* Studies Reinforce that Adolescents' Unique Brain Development Leads to Greater Risk-Taking, Particularly in Stressful Situations 14

2. Post-*Graham* Studies Confirm that Adolescents' Brains are Less Capable of Impulse Control and Rational Judgment 19

B. Adolescents are Uniquely Susceptible to Environmental Influences, Which Reinforce Neurological Differences 21

1. Environmental Factors, Often Beyond Their Control, Greatly Influence Adolescents' Development and Behavior 22

2. Recent Scientific Research Confirms that Adolescents are Unusually Susceptible to Negative Peer Influence 26

II. NONE OF THE GOALS OF PENAL SANCTIONS JUSTIFIES LIFE WITHOUT PAROLE FOR JUVENILE OFFENDERS, REGARDLESS OF THE CRIME COMMITTED 28

III. THE SAME DEFICIENCIES THAT AFFECT ADOLESCENT DECISION-MAKING AND BEHAVIOR MAKE THEM LESS ABLE TO AID IN THEIR OWN DEFENSE 32

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES:

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are psychologists, social scientists, and neuroscientists who have devoted their careers to the study of adolescent behavior and development. In *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2009), the Court relied upon the substantial body of professional literature and scientific evidence confirming that adolescents are significantly different from adults in critical respects, which severely undermine the rationale for imposing our most severe sentences on adolescents and increase the prospects for their rehabilitation. *Amici* respectfully submit this Brief to update and further address this literature and evidence, which continues to support the logic of *Roper* and *Graham* and the conclusion that a sentence of life without the possibility of parole is unconstitutionally cruel when imposed on adolescents, regardless of the crime committed.

The logic of *Roper* and *Graham*, which fundamentally depends upon the unique nature of adolescents, supports the arguments of Petitioners Evan Miller and Kuntrell Jackson. Although adolescents should be held responsible for their actions, compared to adults they are neurologically predisposed to engage in risk-seeking and poor decision-making, highly susceptible to negative peer influence, and less able to understand the nature of the legal proceedings against them and therefore less

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[1] Pursuant to Rule 37.6, *Amici* state that no counsel for any party authored this Brief in whole or in part, and no person or entity other than *Amici* made a contribution to fund or intended to fund this Brief. Counsel for all parties have consented to the filing of this Brief, and letters of consent have been filed with the Clerk.

able to effectively aid in their own defense. Adolescents are highly malleable, however, and therefore responsive to rehabilitation and capable of profound change. To deprive adolescents, who are neurologically less capable than adults of acting rationally and understanding consequences, who are substantially affected by the influence of peers and their surroundings, and who are virtually certain to mature and evolve with support and proper environmental influence, of "any opportunity to achieve maturity of judgment and self-recognition of human worth and potential" is contrary to the standards of decency that define a just society.

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SUMMARY OF ARGUMENT

The Court acknowledged in *Roper* and reaffirmed in *Graham* that adolescent offenders are inherently "not as morally reprehensible as . . . adult" offenders, relying in part upon scientific study demonstrating that adolescents' neurological maturity and development are significantly different from those of adults.[2] The body of scientific study has only deepened since those decisions and continues to confirm that compared with adults, the unique developmental characteristics of adolescents' brains lead to more impulsive behavior, the failure to comprehend consequences, and an underdeveloped sense of self, all of which may cause poor decisions and reckless actions. Adolescents also are particularly susceptible to negative environmental influences, which in turn may influence brain biology in a way that compounds the characteristics associated with their unique developmental stage. This distinction between the adolescent brain and the adult brain means that adolescent offenders are less culpable than adults and "cannot with reliability be classified among the worst of offenders."[3] This is true regardless of the crime committed.

Based upon this immature capacity and "diminished culpability," the Court has held that the death penalty cannot be imposed on adolescents, "no matter how heinous the crime."[4] For the same reasons, the Court has held that a sentence of life without parole, our "second most severe penalty," is

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[2] *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *see also Roper v. Simmons*, 543 U.S. 551, 561 (2005).

[3] *Graham*, 130 S. Ct. at 2026.

[4] *Roper*, 543 U.S. at 568.

unconstitutionally disproportionate for adolescents who commit non-homicide crimes — without regard to their heinousness or depravity.[5] The denial of all possibility of parole is particularly cruel in light of adolescents' unique capacity for change and rehabilitation, because a sentence of life without parole "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[6] Although *Amici* believe that adolescents can and should be held accountable for their actions, based on this logic, it is arbitrary and irrational to deny the possibility of parole solely to adolescent offenders whose crimes involved homicide.

This Brief focuses on the scientific and academic study post-*Graham* that confirms and extends our knowledge and understanding of adolescents' neurological, physiological, and psychological development. *First*, research continues to confirm that the process of adolescent brain development leads to greater vulnerabilities to high-sensation seeking behavior and less ability to fully comprehend consequences in comparison to adults. Recent studies have reinforced the conclusion that adolescents have a higher tendency to engage in risky behavior when faced with emotional or stressful situations. Environmental factors such as exposure to violence, peer influences, and availability of illegal substances only compound these deficiencies.

Second, ongoing research confirms that adolescents are highly amenable to rehabilitation and change. The very immaturity and plasticity that

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[5] *Graham*, 130 S. Ct. at 2027.

[6] *Id.* at 2032.

create an increased propensity for wrongdoing in adolescents also provide an enormous capacity for learning, development, and growth. Most adults understand and believe that the persons they were at age fourteen or fifteen are not the persons they are today. A sentence of life imprisonment without possibility of parole eliminates that opportunity for change and "forswears altogether the rehabilitative ideal."[7]

No penological goal is furthered by denying the possibility of parole to adolescents who receive life sentences. There is no retributive benefit to maximizing the punishment of the less culpable; and adolescents with underdeveloped rationality are unlikely to be deterred by losing the possibility of parole. At the same time, no legitimate interest is served by denying the prospect of rehabilitation to those most likely to respond to it, or by forever incapacitating those least likely to need it.

Third, to the extent one believes that some individuals even as adolescents are simply beyond hope (and *Amici* do not), our legal system is ill-equipped to identify those individuals at the time of trial. "[I]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[8] Even if courts had that ability, adolescents are far less capable of participating effectively in proceedings designed for adults, including by communicating with authority figures such as the police, judges, and their own

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[7] *Id.* at 2030.

[8] *Roper*, 543 U.S. at 573.

counsel. Fundamental fairness does not countenance requiring adolescent defendants to prove the impossible, years in advance, in the adult legal system. To the contrary, fairness and decency require an opportunity to demonstrate, at some point in their lives, that crimes committed as a child do not reflect their true, developed characters and should not doom them to die behind bars.

In sum, the imposition of a sentence of life without parole on adolescents is inconsistent with scientific understanding of human growth, does not further legitimate penological purposes, and is fundamentally unfair. The Court so held in *Graham* for the adolescent who commits any non-homicide crime, which may include depraved and despicable acts such as maiming, raping, and torturing. It is equally true for crimes involving homicide. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

ARGUMENT

I. SCIENTIFIC RESEARCH POST-*ROPER* AND *GRAHAM* CONTINUES TO CONFIRM THAT ADOLESCENTS ARE BIOLOGICALLY LESS DEVELOPED AND CONSEQUENTLY LESS CULPABLE THAN ADULTS.

The Court has several times observed "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[9] To support this observation, the Court in *Roper* and *Graham* relied upon a growing body of research regarding the development of the brain, which shows that

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[9] *Id.* at 569.

adolescents differ from adults in critical ways. That body of study has continued to grow since *Graham*, and continues to show that adolescent decision-making processes are significantly different than those of adults. Adolescents are more oriented toward high-sensation and novelty-seeking behavior and are more susceptible to environmental influences such as violent surroundings, peer pressure, and substance abuse. These observations are independent of the nature of the crime, and apply equally to adolescents involved in homicide and adolescents involved in other heinous crimes that do not involve death.

A. Differences in Neurological Development Lead to Greater Vulnerability for Risky and Reward-Seeking Behavior in Adolescents.

In holding that adolescents are inherently less culpable than adults, the Court in *Roper* and *Graham* observed that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds,"[10] including differences in impulse and behavior control. Ongoing advances in research, including neuroimaging studies, decision-making task studies, and Diffusion Tensor Imaging ("DTI") studies, continue to confirm that adolescents' brains are not fully developed in unique ways that lead to a higher likelihood of risky behavior and make it "misguided to equate the failings of a minor with those of an adult."[11]

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[10] *Graham*, 130 S. Ct. at 2026.

[11] *Id.*

1. *Post-*Graham *Studies Reinforce that Adolescents' Unique Brain Development Leads to Greater Risk-Taking, Particularly in Stressful Situations.*

Two neurobiological systems underlie risky behavior: the prefrontal regulatory system (which is responsible for rational judgment and impulse control)[12] and the limbic system (which is responsible for emotional and reward-seeking behavior).[13] During adolescence, this "dual-system" is poorly balanced. Activity in the limbic system surges while the prefrontal regulatory system remains relatively immature. This is evident in functional magnetic resonance imaging ("fMRI") brain scans, which demonstrate that adolescents' brains are unlike those of adults or very young children: Adolescents' prefrontal regulatory systems are less effective at regulatory control than adults', and adolescents' limbic systems are more active than adults' or children's.[14] As a result of the slower growth of the impulse-control system relative to the reward-seeking system, adolescents are particularly vulnerable to

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[12] Leah Somerville et al., *Frontostriatal Maturation Predicts Cognitive Control Failure to Appetitive Cues in Adolescents*, 23 J. COGNITIVE NEUROSCI. 2123, 2123-24 (2011); Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 DEVELOPMENTAL PSYCHOBIOLOGY 216, 216-17 (2010).

[13] Steinberg, *supra* note 12, at 216-17; Bernd Figner et al., *Affective and Deliberative Processes in Risky Choice*, 35 J. EXPERIMENTAL PSYCHOL. 709, 710 (2009)); Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 91-92 (2008).

[14] Todd Hare et al., *Biological Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63 BIOLOGICAL PSYCHIATRY 927, 932 (2008).

risk-taking and poor decision-making,[15] which may in the wrong circumstances contribute to delinquent behavior and which the Court has held means that "juvenile offenders cannot with reliability be classified among the worst offenders."[16]

Over the past decade, the scientific community has reached a consensus that the prefrontal regulatory systems of adolescents' brains develop more slowly than other neural systems, including systems that encourage risky and reward-seeking behavior.[17] Since *Graham*, studies continue to confirm that the prefrontal cortex is among the last regions of the brain to mature.[18] In fact, the prefrontal cortex is not fully mature until an

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[15] Somerville et al., *supra* note 12, at 2130-32; Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 BRAIN & COGNITION 160, 161-62 (2010); Figner et al., *supra* note 13, at 710-11; Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 212, 218 (2009).

[16] *Graham*, 130 S. Ct. at 2026.

[17] *See, e.g.*, Steinberg, *supra* note 12; Sunita Bava & Susan Tapert, *Adolescent Brain Development and the Risk for Alcohol and Other Drug Problems*, 20 NEUROPSYCHOL. REV. 398 (2010); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459 (2009); BJ Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62 (2008); Adriana Galvan et al., *Risk-Taking and the Adolescent Brain*, 10 DEVELOPMENTAL SCI. F8 (2007); Sarah-Jayne Blakemore & Suparna Choudhury, *Development of the Adolescent Brain*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 296 (2006).

[18] Alison Burke, *Under Construction*, 34 INT'L J.L. & PSYCHIATRY 381, 383 (2011); Steinberg, *supra* note 15, at 161.

individual reaches his or her twenties.[19] Given the role of the prefrontal regulatory system in rational judgment and emotional control, reduced prefrontal activity is strongly linked to poor adolescent decision-making in the "heat of the moment."[20]

At the same time, adolescents are undergoing fundamental neural developments that render them more vulnerable to risk-taking,[21] including rapid development of the limbic system[22] and alteration of the dopaminergic neurotransmission, which is key to reward-seeking behavior.[23] In fact, high levels of dopamine in the region of the brain responsible for rational judgment and regulatory control peak during adolescence, further increasing propensity to engage in risky and novelty-seeking behavior.[24]

One recent study, the "Columbia Card Task" ("CCT") study, both reinforces prior findings on adolescent risk-taking, and confirms that adolescents take greater risks than adults when faced with emotional or stressful situations. The CCT study

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[19] *See, e.g.*, Jay Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 ANNALS N.Y. ACAD. SCI. 77, 83 (2004); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8178 (2004).

[20] Hare et al., *supra* note 14, at 932-33.

[21] Somerville et al., *supra* note 12, at 2129-30; M. Asato et al., *White Matter Development in Adolescence*, 20 CEREBRAL CORTEX 2122, 2128 (2010).

[22] Hare et al., *supra* note 14, at 932.

[23] Monica Luciana, *Adolescent Brain Development*, 72 BRAIN & COGNITION 1, 3 (2010); Dustin Wahlstrom et al., *Developmental Changes in Dopamine Neurotransmission in Adolescence*, 72 BRAIN & COGNITION 146, 150-52 (2010).

[24] Wahlstrom et al., *supra* note 23, at 152.

tested the dual-system theory proposed in previous studies, such as the "Iowa Gambling Task" study, which were brought to the attention of the Court in *Graham*. In the Iowa Gambling Task study — thought to simulate real-life decision-making — participants were asked to choose playing cards from "good decks," which offered smaller one-time rewards but led to net gains over time, or "bad decks," which included potential for very large one-time rewards but generally led to net losses over time. Compared to adults, adolescents ages thirteen to fifteen took longer to choose from the good decks, demonstrating a heightened sensitivity to immediate rewards.[25]

The CCT study confirmed the findings in the Iowa Gambling Task study and provided additional data points by measuring risk-taking among younger adolescents, older adolescents, and adults. The CCT study recorded electrodermal activity during a card game through skin conductance response, a widely-used physiological measure of emotional arousal. Each participant was asked to decide whether to turn over a card in a display, where each card returned either a gain or a loss. Participants could stop at any point and claim a payoff. Because the likelihood of experiencing a loss increased with each card turned over, an individual's decision to turn over more cards reflected a riskier strategy.[26]

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[25] Eveline Crone & Maurits van der Molen, *Developmental Changes in Real Life Decision Making*, 25 DEVELOPMENTAL NEUROPSYCHOL. 251, 252 (2004); *accord* Elizabeth Cauffman et al., *Age Differences in Affective Decision-Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193 (2010).

[26] Figner et al., *supra* note 13, at 712-15.

The CCT study included separate "hot" and "cold" versions of the experiment: The "cold" versions eliminated emotional triggers by requiring participants to proceed without feedback, while the "hot" versions triggered emotional decision-making by providing immediate feedback about each decision to turn over a card. The emotional triggers were designed to mimic the emotional pressure of day-to-day life decisions. The CCT study found, and additional studies have verified, that such "hot" experiments reliably trigger activity in the emotional centers of the brain. And in the "hot" experiments, both adolescent groups turned over more cards than adults.[27]

The CCT study confirmed that adolescents exhibit significantly greater risk-taking than adults when faced with emotional situations. This study also tested factors not previously tested, including adolescents' and adults' differing abilities to process probability, gain amounts, and loss amounts. While adults took into account all three factors, adolescents primarily took into account only probability, and loss and gain amounts had virtually no effect on adolescents' decisions. In short, the study substantiates that adolescents, relative to adults, are more heavily influenced by the emotional limbic system and do not consider all relevant factors when making risky decisions under stressful situations.[28]

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[27] *Id.*; *see e.g.*, A. Aron et al., *Human Midbrain Sensitivity to Cognitive Feedback and Uncertainty During Classification Learning*, 92 J. NEUROPHYSIOLOGY 1144 (2004); D. Shohamy, *Cortico-Striatal Contributions to Feedback-Based Learning*, 127 BRAIN 851 (2004).

[28] Figner et al., *supra* note 13, at 726-28.

2. *Post-*Graham *Studies Confirm that Adolescents' Brains are Less Capable of Impulse Control and Rational Judgment.*

Adolescents also are less capable than adults of controlling their impulses and engaging in rational decision-making because the white matter that transmits signals within the brain is relatively undeveloped. Gray matter in the brain represents information processing centers, while white matter coordinates how well these centers work together.[29] As a result of undeveloped white matter, the portion of the adolescent brain responsible for rational judgment and impulse control does not communicate with and control the emotional and reward-seeking portion of the brain as efficiently or effectively as an adult's.

Recent studies confirm that as adolescents' brains develop and white matter increases, the prefrontal regulatory system becomes better able to regulate the limbic system, which results in improved decision-making. As adolescents grow older, white matter increases and gray matter decreases. In particular, white matter increases through a process called "myelination," which speeds and improves information processing.[30] Myelination continues to occur through young adulthood[31] and is central to

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[29] Vincent Schmithorst & Weihong Yuan, *White Matter Development During Adolescence as Shown by Diffusion MRI*, 72 BRAIN & COGNITION 16, 16-19 (2010).

[30] Geier & Luna, *supra* note 15, at 216.

[31] Damien Fair et al., *Functional Brain Networks Develop from a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1, 8 (2009).

effective cognitive control.[32] At the same time, gray matter decreases both naturally and through "synaptic pruning," whereby under-utilized synapses die off.[33] These processes have been found to continue into adulthood, especially in the frontal regions of the brain, supporting improvements in regulatory control.[34]

Since these phenomena were brought to the Court's attention in *Graham*, Diffusion Tensor Imaging ("DTI") has become a widely used method to measure white matter growth.[35] DTI is a sophisticated form of a well-established magnetic resonance imaging method called Diffusion-Weighted Imaging ("DWI")[36] and is one method of measuring connectivity between brain regions.[37] These DTI studies have shown a positive correlation between age and white matter volume, which increases into and through young adulthood, particularly in the regions responsible for impulse control and rational judgment.[38]

Other advances such as magnetic resonance imaging ("MRI") studies that test resting-state

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[32] Hare et al., *supra* note 14, at 932.

[33] Geier & Luna, *supra* note 15, at 216.

[34] M. Asato et al., *supra* note 21, at 2125-27.

[35] *Id.*; Schmithorst & Yuan, *supra* note 29, at 19; Thomas Paus, *Growth of White Matter in the Adolescent Brain*, 72 BRAIN & COGNITION 26, 27 (2010).

[36] J. Guadagno et al., *Progress in Imaging Stroke*, 65 BRITISH MED. BULL. 145, 147 (2003).

[37] BJ Casey et al., *Changes in Cerebral Functional Organization During Cognitive Development*, 15 NEUROBIOLOGY 239, 239 (2005).

[38] Schmithorst & Yuan, *supra* note 29, at 21; Asato et al., *supra* note 21, at 2125-27; Geier & Luna, *supra* note 15, at 216.

functional connectivity provide further understanding of relationships between brain regions, how they work together, and how they change with development.[39] One resting-state functional connectivity MRI study of 107 adolescents ages fourteen to nineteen revealed that young adolescents demonstrated patterns of connectivity between brain regions more similar to that of impulsive juvenile offenders, while that of older adolescents mirrored less-impulsive juvenile offenders.[40] The study found that "younger brains tend to have a 'more impulsive' pattern of . . . functional connectivity,"[41] supporting the conclusion that adolescents are neurologically less capable of impulse control than adults.

B. Adolescents are Uniquely Susceptible to Environmental Influences, Which Reinforce Neurological Differences.

The Court observed in *Roper* and *Graham* that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," than adults.[42] These negative influences impact adolescents' brain development. As a result of "plasticity," whereby the synapses grow and become stronger when used and weaken and die off when unused, adolescents' exposure to negative influences reinforces the effect of the adolescent brain's immature prefrontal regulatory system and

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[39] Fair et al., *supra* note 31, at 8.

[40] Benjamin Shannon et al., *Premotor Functional Connectivity Predicts Impulsivity in Juvenile Offenders*, 108 PROC. NAT'L ACAD. SCI. 11241, 11241-44 (2011).

[41] *Id.*

[42] *Graham*, 130 S. Ct. at 2026.

mature limbic system.[43] At the same time, however, the adolescent brain's plasticity allows for increased responsiveness to changing circumstances, supporting the conclusion that adolescents will respond to appropriate interventions and efforts at rehabilitation. Research continues to confirm this point.[44]

Of course, many who are born into difficult circumstances, experience challenging environments, or face peer pressure overcome those situations and reach adulthood without committing crimes. The question, however, is not whether those who fail to immediately overcome their circumstances should be held accountable for their actions; it is whether they must forever forfeit the opportunity, after appropriate punishment and intervention, to show that they have transcended their adolescent personality and circumstances and matured, developed, and changed.

1. *Environmental Factors, Often Beyond Their Control, Greatly Influence Adolescents' Development and Behavior.*

Scientists have amassed significant evidence that environmental experiences play a crucial role in shaping adolescents' brain development and affecting their behavior. Studies involving the observation of adolescents from childhood to adulthood have shown, for example, a correlation between delinquent

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[43] Robert Anda et al., *The Enduring Effects of Childhood Abuse and Related Experiences*, 256 EUROPEAN ARCHIVES PSYCHIATRIC & CLINICAL NEUROSCI. 174, 181 (2006).

[44] *See* Mark Lipsey et al., *Effective Intervention for Serious Juvenile Offenders*, JUV. JUST. BULL. 4-6 (2000); *see also* Sue Ramsden et al., *Verbal and Non-Verbal Intelligence Changes in the Teenage Brain*, 479 NATURE 113, 113-15 (2011).

behavior and trauma.[45] One study showed that 92.5% of 898 adolescent detainees previously experienced traumatic events such as witnessing assault or murder, being threatened with a weapon, or being forced into sexual acts.[46] The trauma of witnessing violence was far more common among this sample of adolescents in juvenile detention (74.9% of males and 63.5% of females) than in the general community (4.9%-40.1%).[47] In another study of trauma among male delinquents ages twelve to seventeen, 76% reported witnessing violence, which was defined as having observed someone being shot, stabbed, sexually assaulted, mugged, robbed, or threatened with a weapon.[48]

These studies also show a correlation between adolescent delinquent behavior and a violent home life. One meta-analytic study analyzing 118 studies on the effects of aggression in the home found that 63% of children who witnessed violence between their parents faced increased difficulties in their psychosocial development, including psychological, social, and academic problems, in comparison to a group who had not been exposed to similar violence.[49] Another meta-analytic study produced consistent results, demonstrating that exposure to violence between parents is associated with an increased risk

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[45] *See* Tina Maschi, *Unraveling the Link Between Trauma and Male Delinquency*, 51 SOC. WORK 59, 62-63 (2006).

[46] Karen Abram et al., *Posttraumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES GEN. PSYCHIATRY 403, 405, 407 (2004).

[47] *Id.*

[48] Maschi, *supra* note 45, at 62-63.

[49] Katherine Kitzmann et al., *Child Witnesses to Domestic Violence*, 71 J. CONSULTING & CLINICAL PSYCHOL. 339, 339, 345 (2003).

of emotional and behavioral problems during adolescence.[50]

The more often adolescents are exposed to threatening environments the more quickly their brains learn to respond to those threats.[51] Frequent exposure to threatening or violent environments strains adolescents' immature prefrontal lobes, which further impairs adolescents' ability to control their impulses.[52] Adolescents who have witnessed aggression and violence or who have been subjected to physical maltreatment in early years are likely to develop a pattern of behavior that includes hypervigilance to threat cues, erroneous attribution of hostile intent to others, choosing aggressive solutions to interpersonal problems when nonviolent solutions are available, and finding the results of aggressive behavior self-satisfying and positive. This pattern, in turn, may lead to later violent behavior.[53]

Research also shows, however, that interventions — which correct for negative environmental factors by teaching parents to control violent behaviors and teaching children new patterns of processing social information — can reduce delinquent behavior, even for the most difficult

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[50] Sarah Evans et al., *Exposure to Domestic Violence*, 13 AGGRESSION & VIOLENT BEHAV. 131, 133, 136-37 (2008).

[51] R. Post, *Transduction of Psychosocial Stress into the Neurobiology of Recurrent Affective Disorder*, 149 AM. J. PSYCHIATRY 999, 1004-05 (1992).

[52] Jane Rutherford, *Community Accountability for the Effect of Child Abuse on Juvenile Delinquency in the Brave New World of Behavioral Genetics*, 56 DEPAUL L. REV. 949, 953 (2007).

[53] Gregory Pettit et al., *Domain Specificity in Relationship History, Social-Information Processing, and Violent Behavior in Early Adulthood*, 89 J. PERSONALITY & SOC. PSYCHOL. 190, 191-92 (2010).

adolescents.[54] For example, one study found that the "Nurse Family Partnership," in which a nurse provides child-care training and social skills development for at-risk mothers during the first two years of their children's lives, reduced the risk of the children's arrest by age fifteen.[55] A subsequent study showed that Conduct Disorder, a high-risk psychiatric condition in which a child repeatedly violates basic social rules and which was once believed to be impervious to treatment, is treatable through intervention.[56] And a recent trial involving 891 children reported that an intervention effort designed to help the parents of highest-risk five-year-olds stop harsh physical discipline, as well as help those children learn skills to prevent the development of aggressive behavior, reduced by 47% the likelihood that the children would commit violent crimes by age eighteen.[57] The success of interventions reflects that

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[54] Conduct Problems Prevention Research Group, *Fast Track Intervention Effects on Youth Arrests and Delinquency*, 6 J. EXPERIMENTAL CRIMINOLOGY 131 (2010); Conduct Problems Prevention Research Group, *Fast Track Randomized Controlled Trial to Prevent Externalizing Psychiatric Disorders*, 46 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1250 (2007); U.S. PUB. HEALTH SERV., YOUTH VIOLENCE (2001); John Paul Wright & Francis Cullen, *Parental Efficacy and Delinquent Behavior*, 39 CRIMINOLOGY 677 (2001).

[55] Peter Greenwood & Susan Turner, *Juvenile Crime and Juvenile Justice*, *in* CRIME AND PUBLIC POLICY 120 (James Wilson & Joan Petersilia eds., 2011); David Olds et al., *Long-Term Effects of Nurse Home Visitation on Children's Criminal and Antisocial Behavior*, 280 J. AM. MED. ASSOC. 1238, 1241 (1998).

[56] Paul Frick, *Effective Interventions for Children and Adolescents With Conduct Disorder*, 46 CANADIAN J. PSYCHIATRY 597, 605 (2001).

[57] Conduct Problems Prevention Research Group, *Fast Track Intervention Effects*, *supra* note 54, at 150.

the same brain plasticity that renders adolescents susceptible to environmental experiences makes them capable of rehabilitation and reform.[58]

2. *Recent Scientific Research Confirms that Adolescents are Unusually Susceptible to Negative Peer Influence.*

As the Court recognized in *Roper* and reaffirmed in *Graham*, adolescents "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[59] In fact, adolescents who commit crimes typically act in peer groups.[60] This observation is consistent with general experience and common sense, and has been confirmed by a substantial body of academic research.[61] Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior[62] and is a consistent predictor of

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[58] Bruce Perry, Maltreatment and the Developing Child (Sept. 23, 2004), *in* THE MARGARET MCCAIN LECTURE SERIES, 2005.

[59] *Roper*, 543 U.S. at 569.

[60] Dustin Albert & Laurence Steinberg, *Peer Influences on Adolescent Risk Behavior*, *in* INHIBITORY CONTROL AND DRUG ABUSE PREVENTION 212 (Michael Bardo et al. eds., 2011); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk-Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 4 DEVELOPMENTAL PSYCHOL. 625, 626 (2005).

[61] *See e.g.*, UNDERSTANDING PEER INFLUENCE IN CHILDREN AND ADOLESCENTS (Mitchell Prinstein & Kenneth Dodge eds., 2008); Philip Cook et al., *The Negative Impacts of Starting Middle School in the Sixth Grade*, 27 J. POL'Y ANALYSIS & MGMT. 104 (2008); DEVIANT PEER INFLUENCES IN PROGRAMS FOR YOUTH (Kenneth Dodge et al. eds., 2006); Gardner & Steinberg, *supra* note 60.

[62] *See, e.g.*, Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEVELOPMENTAL SCI. F1 (2011); *see generally* DEVIANT PEER INFLUENCES, *supra* note 61.

adolescent delinquency.[63] Peer-influenced delinquent behavior as a result of the influence of older peers is particularly acute.[64]

Recent MRI tests confirm a long line of studies demonstrating both the neurological foundation for adolescents' reduced impulse control when faced with peer pressure and the link between susceptibility to peer pressure and delinquent behavior.[65] The mere presence of peers may push adolescents toward risky behavior.[66] In one study, researchers measured the brain activity of adolescents and adults as they made decisions in a simulated driving game.[67] Participants were required to reach the end of a track as quickly as possible and were forced to decide whether to run a yellow light at an intersection. The participants played the game either alone or with two peers. Consistent with past findings,[68] this study found that only adolescents took a greater number of risks in the

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[63] Albert & Steinberg, *supra* note 60, at 212; Mary Gifford-Smith et al., *Peer Influence in Children and Adolescents*, 33 J. ABNORMAL CHILD PSYCHOL. 255, 255-58 (2005).

[64] David Harding, *Violence, Older Peers, and the Socialization of Adolescent Boys in Disadvantaged Neighborhoods*, 74 AM. SOC. REV. 445 (2009); Cook et al., *supra* note 61, at 118-19; Scott Leatherdale, *The Influence of Friends, Family, and Older Peers on Smoking Among Elementary School Students*, 42 PREVENTIVE MED. 218, 221 (2006).

[65] Chein et al., *supra* note 62, at F7-F8; Steinberg, *supra* note 15, at 162; Marie-Helene Grosbras et al., *Neural Mechanisms of Resistance to Peer Influence in Early Adolescence*, 27 J. NEUROSCI. 8040, 8040 (2007); Suparna Choudhury et al., *Social Cognitive Development During Adolescence*, SOC. COGNITIVE & AFFECTIVE NEUROSCI. 165, 171 (2006).

[66] Gardner & Steinberg, *supra* note 60; *see also* Albert & Steinberg, *supra* note 60, at 212.

[67] Chein et al., *supra* note 62, at F2-F3.

[68] Gardner & Steinberg, *supra* note 60.

presence of peers. In fact, adolescents took twice as many risks when they knew peers were watching. Furthermore, the regions of the brain associated with emotion and reward-seeking were activated to a greater degree when adolescents knew they were being observed by peers.[69]

In addition, adolescents' reduced ability to control impulses when faced with peer pressure may lead to alcohol use and abuse, which increases the likelihood of delinquent behavior.[70] In turn, alcohol abuse enhances the uneven development of adolescents' brains by overpowering normal chemistry and blocking growth in the underdeveloped logic centers.[71] As a result, adolescent alcohol abuse is both a by-product of a still-maturing prefrontal cortex and a contributing factor to poor decision-making. Yet, studies and statistics show that while both substance use problems and delinquency start and fuel each other during mid-adolescence, they often cease by early adulthood.[72]

II. None of the Goals of Penal Sanctions Justifies Life Without Parole for Juvenile Offenders, Regardless of the Crime Committed.

The Court in *Graham* concluded that none of the goals of penal sanctions is furthered by denying the possibility of parole to adolescent offenders for

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[69] Chein et al., *supra* note 62, at F7.

[70] Edward Mulvey et al., *Substance Use and Delinquent Behavior Among Serious Adolescent Offenders*, Juv. Just. Bull. 3 (2010).

[71] Bava & Tapert, *supra* note 17, at 403-05; Mulvey et al., *supra* note 70, at 4.

[72] Mulvey et al., *supra* note 70, at 4.

non-homicide offenses, because adolescents are less culpable and more susceptible to rehabilitation than adults. "Life without parole sentences share some characteristics with death sentences that are shared by no other sentences," including "alter[ing] the offender's life by a forfeiture that is irrevocable," and "depriv[ing] the convict of the most basic liberties without giving hope of restoration."[73] In short, a life without parole sentence "means denial of hope."[74] This logic applies to all adolescent offenders, not just to those convicted of non-homicides.

No scientific study suggests that adolescents involved in homicide crimes are situated differently from other adolescents with respect to emotional and intellectual maturity or brain development. While crimes involving homicide are among the most serious under the law, the factors that reduce culpability in adolescence exist regardless of the crime. There is no retributive benefit to maximizing the punishment of the less culpable; and adolescents' underdeveloped rational decision-making is unlikely to be deterred by the potential impact of losing the possibility of parole. At the same time, because adolescents have great potential for rehabilitation, they are least likely to require lifetime incapacitation.

Sentencing adolescents to life without parole is especially perverse from a rehabilitative standpoint, because compared to adults, adolescents are particularly amenable to change as they mature and develop. Studies demonstrate that most adolescents will "age out" of their risk-taking behavior, fully develop their ability to control impulses, and respond

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[73] *Graham*, 130 S. Ct. at 2027.

[74] *Id.*

to meaningful incentives and opportunities to succeed.[75] Studies and statistics confirm that crime rates typically rise in early adolescence, peak during mid-to-late adolescence, and then decline.[76] Research indicates that most violent adolescent offenders' "criminal careers" span a period of less than one year.[77] Thus, a large majority of young adolescents will limit their deviant and anti-social behaviors to the adolescent years.[78]

Studies also demonstrate that adolescents can recover and reform delinquent behavior.[79] Rehabilitative programs have proven highly effective for even the most serious adolescent offenders. For example, multiple trials have shown that Multi-Systemic Therapy ("MST"), an intensive family- and community-based treatment program designed specifically to address serious antisocial behaviors of at-risk youth by making positive changes in social systems such as the home, school, community, and peer relations, results in substantially reduced

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[75] Terrie Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior*, 100 PSYCHOL. REV. 674, 692-94 (1993); *See* Gardner & Steinberg, *supra* note 60, at 632.

[76] *See* U.S. DEP'T OF JUSTICE, OJJDP STATISTICAL BRIEFING BOOK, AGE-SPECIFIC ARREST RATE TRENDS (2011); *see also* Burke, *supra* note 18, at 384; Conduct Problems Prevention Research Group, *Fast Track Intervention Effects*, *supra* note 54, at 132; Moffitt, *supra* note 75, at 675.

[77] Richard A. Mendel, LESS HYPE MORE HELP: REDUCING JUVENILE CRIME, WHAT WORKS – AND WHAT DOESN'T 15 (Am. Youth Policy Forum et al. eds., 2000).

[78] Burke, *supra* note 18, at 384.

[79] *Id.*; Sonja Schoenwald et al., *Inside Multisystemic Therapy*, 8 J. EMOTIONAL & BEHAV. DISORDERS 113, 113-14 (2000).

recidivism rates.[80] One meta analysis of fifty-eight experimental and quasi-experimental studies has shown that Cognitive Behavioral Therapy ("CBT"), a form of psychotherapy that uses a variety of techniques to learn goals and improve skills so that an individual can achieve those goals, is most successful for high-risk individuals.[81] A comprehensive and well-regarded study providing an overview of meta-analytic studies found that rehabilitation programs were effective, supporting the general conclusion that rehabilitation treatment is capable of reducing the re-offense rates of convicted offenders.[82]

Simply put, adolescent offenders are highly likely to respond to rehabilitative efforts over the course of their lives as they grow, mature, learn, and change. As the Court observed in *Graham* for non-homicide offenders, the Eighth Amendment "forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society" by forever denying the possibility of parole.[83]

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[80] Mark Lipsey & Francia Cullen, *The Effectiveness of Correctional Rehabilitation*, 3 ANN. REV. L. & SOC. SCI. 297, 308 (2007); Schoenwald et al., *supra* note 79, at 113-14.

[81] Nana Landenberger & Mark Lipsey, *The Positive Effects of Cognitive-Behavioral Programs for Offenders*, 1 J. EXPERIMENTAL CRIMINOLOGY 451, 471 (2005); *see also* Lipsey & Cullen, *supra* note 80.

[82] Lipsey & Cullen, *supra* note 80, at 314.

[83] *Graham*, 130 S. Ct. at 2030.

III. The Same Deficiencies that Affect Adolescent Decision-making and Behavior Make Them Less Able to Aid in Their Own Defense.

In *Roper* and *Graham*, the Court considered and rejected taking a case-by-case approach to maturity and culpability during sentencing for adolescents, because "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,"[84] and because a case-by-case approach "does not take account of special difficulties encountered by counsel in juvenile representation."[85] This same difficulty counsels against taking a case-by-case approach here.

The Court in *Graham* acknowledged what scientific and clinical studies have confirmed: "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings."[86] Fairness counsels strongly against allowing a lifetime forfeiture against those who, due to their youth and inexperience, are less able to participate effectively in the proceedings against them, less able to consult with counsel, and less able to assist in preparing their defense.

First, adolescents are far less capable than adults of understanding the nature of the legal proceedings against them — including the charges pending, the costs and benefits of available pleas, the import of potential penalties, and their

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[84] *Roper*, 543 U.S. at 573.

[85] *Graham*, 130 S. Ct. at 2032.

[86] *Id.*

constitutionally guaranteed rights.[87] According to one study, only 45% of adolescents compared with 74% of adults demonstrated an understanding of the *Miranda* warnings.[88] In addition, adolescents may often mistakenly believe that they will be punished for exercising their legal rights. In one study, only one-third of 199 adolescents, compared to two-thirds of 260 adults, recognized that they would not be punished by a judge for asserting their right to remain silent.[89] These phenomena have been documented for decades.

Recent studies continue to confirm these conclusions. In one 2007 study, 78% of defendants ages eleven to thirteen demonstrated an "impaired" understanding of their *Miranda* rights, compared to 63% of defendants ages fourteen to fifteen and 35% of defendants ages sixteen to seventeen.[90] Not surprisingly, those who are least able to understand their rights are most likely to waive them. A 2005 study reported that 86% of adolescents ages eleven to seventeen detained in a juvenile facility had waived their right to remain silent.[91]

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[87] *See generally* YOUTH ON TRIAL (Thomas Grisso & Robert Schwartz eds., 2000).

[88] Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 12 (1997).

[89] *See* Thomas Grisso, JUVENILES' WAIVER OF RIGHTS 124 (Plenum Publ'g Corp. 1981).

[90] Jodi Viljoen et al., *Adjudicative Competence and Comprehension of* Miranda *Rights in Adolescent Defendants*, 25 BEHAV. SCI. & L. 1, 9 (2007).

[91] Jodi Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants*, 29 L. & HUM. BEHAV. 253, 255, 261 (2005).

Second, adolescents are at greater risk of misunderstanding the role of their counsel. Effective trial participation requires "a personally relevant understanding of the lawyer's advocacy role and the confidential nature of the attorney-client relationship, as well as comprehension of one's own directive role in the process."[92] Because adolescent defendants often lack these capacities, they may question an attorney's allegiance and withhold relevant information out of fear that it will be used against them.[93] One study of fifty adolescents ages twelve to eighteen showed that while 92% reported that they believed attorney-client confidentiality prevented their attorney from disclosing their conversations, 26% also believed that a lawyer could disclose any information to a judge, and 30% also believed that a lawyer could tell their parents what they had said.[94] Another found that 28% of nearly 200 adolescent offenders, as compared to only 6% of 260 adult offenders, believed that confidentiality did not apply if the lawyer was aware of the client's guilt.[95] This is especially true for adolescents represented by public defenders.[96]

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[92] Melinda Schmidt et al., *Effectiveness of Participation as a Defendant*, 21 BEHAV. SCI. & L. 175, 177 (2003).

[93] *Id.*

[94] Michele Peterson-Badali et al., *Young People's Experience of the Canadian Youth Justice Systems*, 17 BEHAV. SCI. & L. 455, 461 (1999).

[95] Thomas Grisso, *Juveniles' Capacities to Waive* Miranda *Rights*, 68 CAL. L. REV. 1134, 1158 (1980).

[96] Donna Bishop & Hillary Farber, *Joining the Legal Significance of Adolescent Developmental Capabilities with the Legal Rights Provided by* In re Gault, 60 RUTGERS L. REV. 125, 164-65 (2007).

Third, adolescents are "less likely than adults to work effectively with their lawyers to aid in their defense."[97] The Court has long recognized that adolescents have special needs in the legal process and require the "guiding hand of counsel at every step in the proceedings against [them]."[98] Adolescents' immaturity affects their ability to communicate meaningfully with counsel, to provide counsel with information relevant to their defense, and to preserve the attorney-client relationship.[99] Adolescents lack adult levels of concentration and memory, which impedes their ability to provide information regarding events relevant to the crime.[100] Moreover, their lack of life experience can prevent them from recognizing exculpatory facts. For instance, one study using structured interviews to examine the relationship between developmental immaturity and the ability to participate in trial demonstrated that adolescents ages eleven to thirteen were significantly less able to recognize information relevant to their defense than adolescents ages fourteen to fifteen, who in turn demonstrated significantly poorer reasoning and recognition of relevant information than adolescents aged sixteen and older.[101]

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[97] *Graham*, 130 S. Ct. at 2032.

[98] *In re Gault*, 387 U.S. 1, 36 (1967).

[99] Steinberg, *Adolescent Development and Juvenile Justice*, supra note 17, at 475.

[100] *Id.*; Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, PUB. L. & LEGAL THEORY WORKING PAPER SERIES 29 (2004).

[101] *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 L. & HUM. BEHAV. 333, 343 (2003); *see also* Steinberg, *Adolescent Development and Juvenile Justice*, *supra* note 17, at 476.

Fourth, the same cognitive deficiencies that impair adolescents in the first place also impair their ability to perform in legal proceedings because they attach more value to short-term results than to long-term consequences than adults.[102] For example, adolescents may be more likely to seek immediate gains such as curtailment of difficult questioning.[103] In an interview of 183 adolescents who were considering waiving their *Miranda* rights, the most frequent concern was "Will I spend the night in jail (detention), or will the police release me to return home?"[104] Another study of 927 adolescents ages eleven to seventeen and 466 adults ages eighteen to twenty-four found that during hypothetical situations involving police interrogation, consultation with a defense attorney, and evaluation of a plea agreement, adolescents performed worse than adults in selecting optimal choices and evaluating future risks, while they were substantially more likely than adults to make choices in conformity with the perceived desires of authority figures.[105] Approximately one-fifth of the adolescents were as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adult subjects who would be incompetent to stand trial.[106]

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[102] Schmidt et al., *supra* note 92, at 191.

[103] *Id.*

[104] *See* Grisso, *supra* note 89, at 151.

[105] *See* Grisso et al., *Juveniles' Competence to Stand Trial*, *supra* note 101, at 352; *see also* Steinberg, *Adolescent Development and Juvenile Justice*, *supra* note 17, at 476.

[106] *Id.*

CONCLUSION

Scientific research continues to confirm that there is a neurological basis for adolescents' poor decision-making and risky behavior, which over time will reduce as they develop and learn from their environment. Adolescence is a period of tremendous change, and a sentence of life without parole for adolescents convicted of homicide would work the same denial of "opportunity to achieve maturity of judgment and self-recognition of human worth and potential" that the Court found cruel and unusual in *Graham*.[107] These factors are a function of the nature of adolescents generally, and apply without regard to whether an adolescent's crime involves homicide. For these reasons, *Amici* respectfully submit that the judgments of the courts below should be reversed.

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[107] *Graham*, 130 S. Ct. at 2032.

Respectfully Submitted,

January 17, 2012

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

SUPREME COURT, U.S.
FILED
JAN 17 2012
OFFICE OF THE CLERK

Nos. 10-9646 and 10-9647

In the Supreme Court of the United States

EVAN MILLER,
Petitioner,,

v.

STATE OF ALABAMA,
Respondent.

On Writ of Certiorari to
The Alabama Court of Criminal Appeals

KUNTRELL JACKSON,
Petitioner,

v.

RAY HOBBS,
Respondent.

On Writ of Certiorari to
The Supreme Court of Arkansas

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

(Counsel for Amicus Curiae *listed inside front cover)*

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a fourteen-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments, when the extreme rarity of such sentences in practice reflects a national consensus regarding the reduced criminal culpability of young children?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a fourteen-year-old as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or other mitigating circumstances?

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

JLWOP CATEGORICALLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT 6

A. THE ABA'S INVESTIGATION, RESEARCH AND THE EXPERIENCE OF ITS MEMBERS SUPPORT A REJECTION OF JLWOP SENTENCES 6

B. THE CHARACTERISTICS OF CHILD OFFENDERS RENDER JLWOP INAPPROPRIATE. 11

C. NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP 17

D. NEITHER PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY ALLOWING THE CHANCE FOR PAROLE 20

E. INTERNATIONAL AUTHORITIES DEMONSTRATE OVERWHELMING OPPOSITION TO JLWOP 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Coker v. Georgia,
433 U.S. 584 (1977) 19

Ewing v. California,
538 U.S. 11 (2003) 19

Furman v. Georgia,
408 U.S. 238 (1972) 19

Graham v. Florida,
130 S.Ct. 2011 (2010) ..... *Passim*

Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex,
442 U.S. 1 (1979) 21

Harmelin v. Michigan,
501 U.S. 957 (1991) 15, 18, 19, 24

Hussain v. United Kingdom,
22 EHRR 1, ¶ 53 (1996) 25

J.D.B. v. North Carolina,
131 S.Ct. 2394 (2011) 12, 17

Johnson v. Texas,
509 U.S. 350 (1993) 19

Naovarath v. State,
105 Nev. 525 (1989) 16

PA Bd. of Prob. and Parole v. Scott,
524 U.S. 357 (1998) 21

Roper v. Simmons,
543 U.S. 551 (2005) ..... *Passim*

Trop v. Dulles,
356 U.S. 86 (1958) 6

U.S. CONSTITUTION

United States Constitution, Eighth
Amendment 1, 20, 24

United States Constitution, Fourteenth
Amendment 1

STATUTES

37 Tex. Admin. Code § 145.2 (2009)..... 23

Ala. Code 13A-5-39(1)..... 14

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Cal. Penal Code § 3041(a) (2005) 22

Ky. Rev. Stat. Ann. § 532.030 (2008)..... 21

Mich. Comp. Laws § 791.234 (2009) 21

RULES

Rules of the Supreme Court 37.3 1

Rules of the Supreme Court 37.6 1

REGULATIONS

120 Mass. Code Regs. 301.01 (2009) 22

Cal. Code Regs, tit. 15 § 2281 (2009) 22

Cal. Code Regs tit. 15 § 2402 (2009) 22

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of the Petitioners. The ABA requests this Court to reverse the decisions below and extend its decision in *Graham v. Florida*, 130 S. Ct. 2011 (2010), to hold that a sentence of life imprisonment without the possibility of parole for a juvenile offender convicted of homicide is impermissible under the Eighth and Fourteenth Amendments of the United States Constitution.

The ABA is the largest voluntary professional membership organization and its nearly 400,000 members constitute the leading association of legal professionals in the United States. The ABA's members come from each of the fifty states, the District of Columbia, and the U.S. Territories. Its members include judges, prosecutors, defense lawyers, lawyers in private practice, as well as those in corporations, non-profit

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authorized this brief in whole or in part, and that no such counsel or party, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court.

organizations, and government agencies.[2] The ABA also includes lawyers involved in correctional facilities and parole boards, as well as legislators, law professors, and law students. Since its inception, this wide cross-section of legal professionals has sought to "[w]ork for just laws, including human rights, and a fair legal process."[3]

The ABA, through its Criminal Law Section, has always taken an active role in advocating for the improvement of the criminal justice system, with a special interest in the improvement of the juvenile justice system through its Juvenile Justice Committee. This committee is composed of stakeholders participating in the juvenile justice system, including both adult and juvenile judges, and lawyers involved in all aspects of the issues facing children in the juvenile justice process.

The ABA's research, investigation and experience of its members, along with its study of developments in juvenile justice law, and scientific and psychological studies regarding the differences between children and adults, has informed the ABA's continuing development of ABA policies relating to the sentencing of children. In addition,

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[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] ABA Mission and Association Goals, *available at* http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited Jan. 11, 2012).

the ABA devoted over nine years working with the Institute of Judicial Administration ("IJA") on the development of standards for the administration of juvenile justice, which culminated in the publication in 1980 of the IJA/ABA *Juvenile Justice Standards* and republication in 1996.[4]

The ABA drew upon this varied and rich experience in its *amicus curiae* briefs in *Graham*, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), in which the ABA discussed its sentencing policies that reflect factors rendering juvenile offenders less morally culpable, and more capable of rehabilitation than adults convicted of the same crimes, including homicide. *See* ABA Briefs in *Graham*, 2009 WL2197339 and *Roper*, 2004 WL 1617399, *available at*

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[4] Institute of Judicial Administration-American Bar Association, *Juvenile Justice Standards, Annotated: A Balanced Approach* (Robert E. Shepherd, Ed. 1996), available at https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf (last visited Jan. 12, 2012). They resulted from an exhaustive historical, legal and criminological study of society's response to juvenile crime and were developed through the efforts of broadly representative task forces made up of juvenile judges, prosecutors, defense lawyers, law professors, experts and public groups that have an interest in the juvenile justice system. They were adopted as ABA policy by the ABA House of Delegates ("HOD"), which is composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections and divisions, and the Attorney General of the United States, among others. *See House of Delegates - General Information*, American Bar Association, http://www.americanbar.org/groups/leadership/delegates.html (last visited 1/9/12).

http://www.abanet.org/amicus/briefs98-03.html (last visited Jan. 11, 2012).

SUMMARY OF ARGUMENT

The ABA respectfully submits that while this Court limited its holding in *Graham* to juveniles convicted of non-homicide offenses, every characteristic and difference between children and adults identified in *Roper* and *Graham* that supports this Court's conclusion that juveniles are less morally culpable and have a greater capacity for rehabilitation than adults also supports an extension of *Graham's* holding to all juveniles regardless of whether they were convicted of homicide. Similarly, *Graham's* holding that the standard penological justifications of sentencing are not served by juvenile life without parole ("JLWOP") sentences applies with equal force to juveniles convicted of homicide. Moreover, the exclusion of juveniles convicted of homicide from the protection of *Graham* does not comport with the "evolving standards of decency that mark the progress of a maturing society." *Roper*, 543 U.S. at 560-61. Each of these arguments for extending *Graham* to juveniles convicted of homicide is supported by the ABA's research, investigation and the experience of its members in formulating, adopting and periodically reviewing the ABA's *Juvenile Justice Standards*, which specifically include standards for sentencing.

Moreover, the ABA urges a conclusion that a JLWOP sentence is unconstitutional even for juveniles convicted of homicide crimes based on the

fact that neither public safety nor penal objectives would be compromised by allowing the chance for parole. Further, consideration should be given to the overwhelming opposition to JLWOP demonstrated by international authorities.

While the Petitioners may focus on the constitutionality of JLWOP as applied to fourteen year old children under particular circumstances, the ABA requests, for the reasons set forth herein and consistent with the consensus of medical and behavioral scientists as to a child's brain development, that this Court hold categorically that a JLWOP sentence for any child under the age of eighteen for any crime is unconstitutional.

The ABA is not asserting that all juveniles should be entitled to parole, but only that they should not be denied the opportunity to be considered for parole before they die in prison. The need for such protection for juvenile offenders is made more compelling by the fact that many juveniles sentenced to JLWOP, including the Petitioners here, are tried as adults before trial judges with no discretion to sentence them to anything but life without the possibility of parole. Thus, many trial judges are stripped of any opportunity to consider the backgrounds, developmental differences or other mitigating factors of youth that this Court, the scientific community, and the ABA have recognized.

ARGUMENT

JLWOP CATEGORICALLY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

A. THE ABA'S INVESTIGATION, RESEARCH AND THE EXPERIENCE OF ITS MEMBERS SUPPORT A REJECTION OF JLWOP SENTENCES.

This Court has adopted categorical rules prohibiting the death penalty for defendants who committed their crimes before age 18, *Roper*, 543 U.S. 551, and JLWOP for defendants convicted of non-homicide crimes committed before age 18, *Graham*, 130 S. Ct. 2011. This Court has recognized "the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Roper*, 543 U.S. at 560-61 (citing *Trop v. Dulles*, 356 U.S. 86. at 100-01 (plurality opinion)). As the Court held, "[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Graham*, 130 S. Ct. at 2021 (citations omitted).

Consistent with this Court's conclusions in *Roper* and *Graham*, and based on the research and guidance provided by its members active in the juvenile justice system, the ABA maintains that JLWOP sentences cannot comport with the the lesser culpability of juvenile offenders, and

therefore, should not be permissible regardless of the crime, including homicide. While recognizing that some juvenile offenders deserve severe punishment for their crimes, the ABA nevertheless concluded in 1980 that when they are compared to adults, their reduced capacity – in moral judgment, self restraint and the ability to resist the influence of others, among other factors – renders them less morally culpable than adults. *See, e.g.*, IJA/ABA *Juvenile Justice Standards Relating to the Transfer Between Courts* at 3 (1980), available at https://www.ncjrs.gov/pdffiles1/ojjdp/82487.pdf (last visited Jan. 11, 2012). That is, children must be treated differently than adults in our justice system:

> The unifying thread to all twenty-three volumes was that we – the adult world – had the right to judge and punish youthful wrongdoers, but we also had responsibilities for adjudicating children fairly, for intervening in families in ways that would be salutary, not punitive and destructive, and for treating youths who must be removed from society in a manner which did not derogate their humanity and guarantee them a pass to the nearest penitentiary.[5]

Subsequently, in 1997, in response to a growing number of state statutes and policies that allowed the transfer for prosecution and sentencing

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[5] *Juvenile Justice Standards*, supra note 4, at xii.

of child offenders to the adult criminal justice system, the ABA created its Task Force on Youth in the Criminal Justice System. In 2001, this Task Force published its report, ABA, *Youth in the Criminal Justice System: Guidelines for Policymakers and Practitioners* (2001). In formally adopting the Task Force's conclusions in 2002, the ABA recognized, *inter alia*, that (a) "youth are developmentally different from adults and these differences should be taken into account", and (b) "judges should consider the individual characteristics of the youth during sentencing."[6]

Following this Court's affirmation of these principles in *Roper*, 543 U.S. 551, and an assessment of studies from the behavioral scientific community, the ABA adopted in February 2008 an additional policy specifically addressing sentence mitigation for juvenile offenders. ABA, *2008 Report with Recommendation #105C* at 2 (Policy adopted Feb. 2008) [hereinafter the "Report"].[7] As stated in the Report at 2, "The ABA's overall approach to juvenile justice policies has been and continues to be to strongly protect the rights of youthful offenders within all legal processes while insuring public safety."

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[6] ABA, *Report with Recommendation #101D* (Policy adopted Feb. 2002), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/jj101d.authcheckdam.pdf (last visited Jan. 11, 2012).

[7] *Available at* http://www2.americanbar.org/sections/criminaljustice/CR200000/Pages/default.aspx (last visited Jan. 11, 2012).

As noted in the Report at 6, the ABA's opposition to JLWOP sentences dates back to the ABA's adoption in 1991 of a policy that endorsed the United Nations Convention on the Rights of the Child. With the ABA's long history of work in juvenile justice as its basis, the Report concluded that sentences for juvenile offenders must recognize that, no matter how adult-like their offenses, they are not adults. *Id.* at 6.[8]

As this Court concluded in *Roper* and again in *Graham*, juvenile offenders have lesser culpability than adult offenders due to the typical behavioral characteristics inherent in adolescence. *Roper*, 543 U.S. at 569-70; *Graham*, 130 S.Ct. at 2026.

Informed by its history of working in juvenile justice and by input from the medical and behavioral scientists, the ABA similarly has concluded that: (1) sentences for juveniles should generally be less punitive than those for adults who have committed comparable offenses; and (2) sentences for juveniles should recognize the key mitigating considerations relevant to their youthful status, including those identified by the Court in *Roper*, 543 U.S. at 567-70, as well as the seriousness of the offense and the delinquent and

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[8] The ABA has continued to adopt policies based on the characteristics of youth, most recently the ABA Report with Recommendation #102B (Policy adopted Feb. 2010), available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102B.authcheckdam.pdf (last visited Jan. 12, 2012), urging the development of simplified *Miranda* warnings for juveniles, in light of their more limited verbal comprehension levels.

criminal history of the juvenile; and (3) sentences even for those convicted of the worst crimes, including homicide, cannot be based on a prediction of what kind of adult the juvenile may become. Accordingly, and as has been the ABA's position since 1991, a JLWOP sentence cannot be supported for any juvenile. Rather, juveniles should be eligible for parole or other early release consideration at a reasonable point during their sentences and, if denied, should be reconsidered for parole or early release periodically thereafter.[9]

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[9] ABA, *Report with Recommendation #105C*, at 9 (Policy adopted Feb. 2008), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/2008/midyear/updated_reports/hundredfivec.authcheckdam.doc (last visited Jan. 11, 2012) (relying, *inter alia*, upon research including MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Issue Brief 3: Less Guilty by Reason of Adolescence* (2006), *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Jan. 11, 2012); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 Behav. Sci. & L. 742 (2000); William Gardner and Janna Herman, *Adolescent's AIDS Risk taking: A Rational Choice Perspective, in Adolescents in the AIDS Epidemic* 17, 25-26 (William Gardner, et al. eds.; 1990); Marty Beyer, *Recognizing the Child in the Delinquent*, 7 Kentucky Ch. Rts. J. 16 (Summer 1999); Meghan M. Deerin, *The Teen Brain Theory*, Chicago Tribune, Aug. 12, 2001, at C1; Catherine C. Lewis, *How Adolescents Approach Decisions: Changes over Grades Seven to Twelve and Policy Implications*, 52 Child Development 538, 541-42 (1981); Thomas Grisso, *What We Know About Youth's Capacities, in Youth on Trial: A Developmental Perspective on Juvenile Justice* 267 (Thomas Grisso and Robert G. Schwartz, eds., 2000); Kim Taylor-Thompson, *States of Mind/States of Development*, 14 Stan. L. & Pol'y Rev. 153, 155 nn 107-108 (2003); Marty Beyer, *Immaturity, Culpability & Competency*

B. THE CHARACTERISTICS OF CHILD OFFENDERS RENDER JLWOP INAPPROPRIATE.

The Court in *Roper* and *Graham*, in declaring unconstitutional the death penalty for juveniles and JLWOP for non-homicide offenses, respectively, recognized that juveniles have lessened culpability and are thus less deserving of the most severe punishments for many reasons having no bearing on the juvenile's crime.[10] As compared to adults, juveniles have a lack of maturity, an underdeveloped sense of responsibility, are more vulnerable to negative influences and peer pressures, have less control over their surroundings, and their characters are not as well formed. *Graham*, 130 S. Ct. at 2021; *Roper*, 543 U.S. at 569-70. Thus, there is "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567.

These characteristics of children mean that even a homicide committed by a juvenile is not

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in Juveniles: A Study of 17 Cases, 15 Summary of Criminal Justice 27 (2000).

[10] This Court recognized that "defendants who do not kill, intend to kill or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." *Graham*, 130 S. Ct. at 2027 (citations omitted). However, the ABA asserts that every characteristic and difference between children and adults identified in *Roper* and *Graham*, and every other consideration supporting the holdings in those cases, support a ruling extending the holding of *Graham* to all juveniles regardless of whether they were convicted of homicide.

evidence of an irretrievably depraved character. As this Court concluded:

> From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for the greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient: as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.

Roper, 543 U.S. at 569-70 (citations omitted).

Likewise, this Court concluded that juveniles are more capable of change than adults, and their actions are less likely to be evidence of irretrievably depraved character. *Graham*, at 2026, citing *Roper*, 543 U.S. at 570. "Maturity can lead to that considered reflection which is the foundation for remorse, renewal and rehabilitation." *Graham*, 130 S. Ct. at 2032. Accordingly, juvenile offenders cannot be classified among the worst offenders. *Id.* at 2038, citing *Roper*, 573 U.S. at 569.

In considering a juvenile offender's personal responsibility and moral guilt, and the ensuing consequences for the sentencing of juveniles, this Court has concluded that children in the criminal justice system are more vulnerable to coercion, and more likely to falsely confess to crimes they did not commit than are adults. *J.D.B. v. North Carolina*,

131 S.Ct. 2394, 2403-2404 (2011).[11] The ABA maintains that, based on its study, research and the experience of its members, two other observations should be considered as well:

> First, juveniles are less capable than adults of communicating with and giving meaningful assistance to their counsel, their limited appreciation of long-term consequences impairs their ability to make appropriate decisions regarding plea bargains and other aspects of their legal strategy, and they lack the basic skills to assist them in identifying exculpatory facts and effectively communicating them to their counsel. Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 Crim. Just. 27, 28 (Summer 2000).
>
> Second, "in eleven out of the seventeen years between 1985 and 2001, juveniles convicted of murder in the United States were more likely to enter prison with a life without parole sentence than adult murder offenders. Even when considering murder offenders sentenced to either life without parole or death sentences, in four of those years, children still were more likely than adults to receive one of those two most punitive sentences." Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States*, 2 (2005) *available at* http://www.amnesty.org/en/library

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11 Samuel Gross, et al., *Exonerations in the United States, 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 545 (2004) (concluding that 42% of the juveniles convicted during that period falsely confessed to crimes they did not commit).

/info/AMR51/162/2005/en (last visited Jan. 11, 2012).[12] Further, minority juveniles are far more likely to be sentenced to life without possibility of parole than their non-minority counterparts. *Id.*

The foregoing observations underscore the need for safeguards, including the possibility of parole, as potential means to alleviate their harsh consequences and to give some opportunity for the exercise of some discretion regarding a juvenile before he or she dies in prison. *See* ABA Report with Recommendation #101D, supra note 7, at ¶6 ("judges should consider the individual characteristics of the youth during sentencing").

Many juveniles sentenced to JLWOP, including the Petitioners here, are tried as adults and the relevant statutes only permitted the adult sentences of either death or life without the possibility of parole.[13] As *Roper* eliminated the

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[12] "On its face, this data suggests that states have often been more punitive towards children who commit murder than adults. At the very least, it suggests age has not been much of a mitigating factor in the sentencing of youth convicted of murder." Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* at 33. These statistics are even more troubling because in the period from 1980 to 2008, just 11.1% of homicide offenders were age 17 and younger. Alexia Cooper and Erica L. Smith, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008* (Nov. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf (last visited Jan. 11, 2012). The ABA questions whether the homicides these children were involved in warranted harsher punishment than the 89% committed by adults.

[13] *See* Ark. Code 5-10-101(c)(1) and Ala. Code 13A-5-39(1).

death sentence for juveniles, the trial judge had only one "option" – life without parole. Thus, these statutory schemes deprived these judges of any discretion whatsoever to consider the backgrounds and mental development of these children in the sentencing process, or any other mitigating factors associated with young offenders, and, the ABA asserts, should be deemed to be contrary to the Court's *Roper* and *Graham* decisions. This lack of discretion is exacerbated by the increasing frequency with which children since the 1970s have been transferred to or tried in the adult criminal justice system. Patrick Griffin et al., Dept. of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles as Adults: An Analysis of state Transfer Laws and Reporting* 8-9 (Sept. 2011), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf (last visited Jan. 11, 2012).[14]

JLWOP is the second most severe penalty permitted by law – next to death. *Graham*, 130 S.Ct. at 2016 citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (J. Kennedy, J., concurring). Indeed, a

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[14] Transfer laws generally fall into three basic categories. First, waiver laws allow juvenile courts to waive jurisdiction on a case by case basis. Second, prosecutors are often vested with discretion, sometimes without formal standards, in deciding whether a prosecution should be brought in juvenile or criminal court. Third, statutory exclusion laws grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile offenders, thus bypassing the juvenile system altogether. *Id.* at 2. Statutory and prosecutorial discretion laws proliferated from the 1970s to 2000, and have changed little since then. *Id.* at 8-9.

sentence of JLWOP "share[s] some characteristics with death sentences...the sentence alters the offender's life by a forfeiture that is irrevocable." *Graham*, at 2027, citing *Naovarath v. State*, 105 Nev. 525, 526 (1989) A JLWOP sentence "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the child], he will remain in prison for the rest of his days.'" *Id.*

The ABA submits that the research, experiences of its members, and informed consideration that provided the basis for the IJA/ABA *Juvenile Justice Standards* and the ABA's policies, as well as behavioral research and studies, reinforce the fact that the transient characteristics that make juveniles less morally culpable and more likely to mature and reform, along with the severe nature of the sentence – death in prison – leads only to a conclusion that a JLWOP sentence should be categorically unconstitutional, even when the juvenile is convicted of homicide.[15]

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[15] Lawrence Steinberg, *A Behavioral Scientist Looks At The Science Of Adolescent Brain Development*, 72 Brain and Cognition 160, 162 (2010) ("From this perspective, middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving."); Sarah-Jayne Blakemore, *Imaging Brain Development: The Adolescent Brain*, NeuroImage, Dec. 8, 2011, at 8 [Epub ahead of print] ("The plentiful data that consistently paint a picture of the adolescent brain as relatively immature might speak against the relatively young

This Court has distinguished between the legal rights, protections and restrictions afforded to or imposed on children as compared to adults in drawing the line at the age of 18. *J.D.B.*, 131 S. Ct. at 2403-04; *Graham*, 130 S. Ct. at 2030; *Roper*, 543 U.S. at 574. The ABA submits that the same distinction should be made here, in declaring JLWOP unconstitutional for all defendants who committed crimes as juveniles.

C. NONE OF THE STANDARD CRIMINAL JUSTICE SENTENCING THEORIES ARE SERVED BY JLWOP.

This Court recognized in *Roper* and *Graham* that transient characteristics of youth mean that none of the standard penological justifications of sentencing – retribution, deterrence, incapacitation or rehabilitation – were served by death sentences for juveniles or JLWOP for juveniles convicted of non-homicide crimes. *Roper*, 543 U.S. 551; *Graham*, 130 S. Ct. 2011. The ABA maintains that the principles recognized in *Roper* and *Graham* apply with equal force to JLWOP sentences for children convicted of homicide.

This Court recognized that the reduced moral culpability of juvenile offenders means that "the case for retribution is not as strong with a minor as with an adult." *Graham*, 130 S.Ct. at 2028, citing *Roper*, 543 U.S. at 571; *see also Roper* at 571. ("Retribution is not proportional if the law's most severe penalty is imposed on one whose

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age of criminal responsibility and harsh sentences for adolescents.").

culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.")

Likewise, "[d]eterrence does not . . . justify the sentence [because] the same characteristics that render juveniles less culpable than adults suggest . . that juveniles will be less susceptible to deterrence." *Graham*, 130 S. Ct. at 2028-9. A juvenile's lack of maturity and propensity for "impetuous and ill-considered actions and decisions" render them "less likely to take a possible punishment into consideration when making decisions." *Id.*; *see also, Roper*, 543 U.S. at 571 ("the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.") (citing *Harmelin*, 501 U.S. at 998-99 (1991) (Kennedy, J., concurring)).[16]

The ABA respectfully asserts that this Court's conclusion – that JLWOP for crimes other than homicide is not justified without the dubious finding that a child is "incorrigible" and not capable

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[16] Studies indicate that there appears to be no significant difference in deterrence between a juvenile death penalty and JLWOP. *See, e.g.*, MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, *Issue Brief 3: Less Guilty by Reason of Adolescence* (2006), *available at* http://www.adjj.org/downloads/6093issue_brief_3.pdf (last visited Jan. 11, 2012) (concluding that juveniles' "lack of foresight, along with their tendency to pay more attention to immediate gratification than to long-term consequences, are among the factors that may lead them to make bad decisions").

of reform, *Graham*, 130 S. Ct. at 2029 – applies with equal force to juveniles convicted of homicides. Likewise, while this Court recognized that the penological goal of incapacitation is served when a juvenile may be a threat to society, the Court also observed that because "the signature qualities of youth are transient," *Roper*, 543 U.S. at 570 (citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993)), the juvenile's continued incapacitation throughout adulthood and into old age without an opportunity for reevaluation, is not justified. *See Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects . . . transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption"). The ABA asserts that the analysis should be no different for juveniles convicted of homicide.

Finally, the Court's conclusion that a sentence of JLWOP for crimes other than homicide cannot be justified by the goal of rehabilitation, *Graham*, 130 S.Ct. at 2029-30, applies with equal force to juveniles convicted of homicide. As stated by Justice Marshall in his dissent in *Harmelin*, 501 U.S. at 1028, a sentence of life imprisonment without the possibility of parole "does not even purport to serve a rehabilitative function...." *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (Stewart, J., concurring)).

"A legitimate punishment must further at least one of these goals." *Ewing v. California*, 538 U.S. 11, 25 (2003); *Harmelin*, 501 U.S at 999 (Kennedy, J., concurring in part and concurring in judgment). As stated in *Coker v. Georgia*, 433 U.S.

584, 592 (1977), the Eighth Amendment bars punishment that "(1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." JLWOP fails on both counts.

D. NEITHER PUBLIC SAFETY NOR PENAL OBJECTIVES WOULD BE COMPROMISED BY ALLOWING THE CHANCE FOR PAROLE.

Public safety would not be compromised by giving the right merely to be considered for parole to those who were children when they committed homicide. Indeed, public safety has not been compromised by giving 14 parole hearings to Sirhan Sirhan[17] and 11 parole hearings to Charles Manson (with another scheduled for 2012)[18], both adults when they committed murder. "Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives." *Graham*, 130 S. Ct. at 2030. However, the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juveniles convicted of nonhomicide crimes] never will be fit to reenter society." *Id.* The ABA asserts that the same

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[17] *Parole Denied for Sirhan Sirhan*, CDCR Today, March 2, 2011, http://cdcrtoday.blogspot.com/2011/03/parole-denied-for-sirhan-sirhan.html (last visited Jan. 11, 2012)

[18] *Parole Denied for Charles Manson*, CDCR Today, May 23, 2007, http://cdcrtoday.blogspot.com/2007/05/parole-denied-for-charles-manson.html (last visited Jan. 11, 2012).

analysis should be applied to juveniles convicted of homicide.

The parole process has safeguards to protect the public, as well as recognized law enforcement and rehabilitative functions.[19] Thus, neither the public safety nor the objectives of the penal system would be compromised by allowing juvenile offenders the chance to be considered for parole.

Parole involves significant checks to protect the public. Years may pass before an offender becomes eligible for parole consideration.[20] Parole boards consider many factors in making parole recommendations, including the seriousness of the offense, the amount of time served, the offender's age, criminal history and prison behavior; participation in prison-based educational, vocational or rehabilitation programs; counseling reports, psychological evaluations, and the viability

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[19] *See e.g. Greenholtz v. Inmates of the Nebraska Penal and Corr. Complex*, 442 U.S. 1, 13 (1979) (the "ultimate purpose of parole . . . is a component of the long-range objective of rehabilitation"); *PA Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 367 (1998) (explaining that "one of the purposes of parole is to reduce the costs of criminal punishment while maintaining a degree of supervision over the parolee"); Bruce Zucker, *A Triumph for Gideon: The Evolution of the Right to Counsel for California's Parolees in Parole Revocation Proceedings*, 33 W. St. U. L. Rev. 1, 3 (2005-2006) (explaining that parole protects society through restrictions, reintegration services and by encouraging inmates to "conform their behavior . . . under the threat of delaying or forfeiting early release from custody").

[20] *See, e.g.*, Ky. Rev. Stat. Ann. § 532.030 (2008) (25 years for capital offense); Mich. Comp. Laws § 791.234 (2009) (10 years before parole consideration for first degree murder or life sentence).

of parole plans, including how the inmate would live and support himself if released.[21] Some states have imposed more stringent approval requirements for certain offenders.[22] Most inmates eligible for parole consideration are not, in fact, granted parole.[23] Offenders whose requests for parole are rejected must wait a certain period of time, sometimes years, before they can be considered again.[24] Some states authorize the governor to reverse a decision granting parole, or impose delays or additional conditions on the terms

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[21] *See, e.g.*, Cal. Penal Code § 3041(a) (2005); Cal. Code Regs. tit. 15 § 2281 (2009); Cal. Code Regs tit. 15 § 2402 (2009).

[22] *See, e.g.*, Michigan Dept. of Corrections, *The Parole Consideration Process*, http://www.michigan.gov/corrections/0,4551,7-119-1384-22909--,00.html (last visited Jan. 11, 2012) (requiring majority of all ten parole board members, rather than just the three member panel, must support parole for Michigan prisoners serving life sentences.)

[23] *See* Thomas P. Bonczar, Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Characteristics of State Parole Supervising Agencies, 2006*, (Rev. Mar. 16, 2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cspsa06.pdf (last visited Jan. 11, 2012) (reporting 54% of adult parole inmates in 15 states were denied request for release on parole).

[24] Massachusetts, for example, provides that if parole is not granted at the initial parole release hearing, a parole review hearing occurs for most inmates annually thereafter. Others sentenced as habitual criminals, committed as sexually dangerous persons or serving life sentences require subsequent hearings 2, 3 and 5 years, respectively, after the initial parole release hearing. 120 Mass. Code Regs. 301.01 (2009).

of parole as an additional check to ensure that public safety is not compromised.[25]

States also impose conditions and restrictions on parolees. States may require the offenders to complete in-prison rehabilitation programs before releasing them on parole.[26] Once released, parolees are subject to any number of restrictions and conditions.

Finally, parole boards retain the right to revoke parole for the violation of any condition imposed, and many parole revocations result not from the commission of another crime, but from a failure to comply with a procedural requirement.[27] A state's ability to revoke parole based on even a procedural violation of parole conditions often is far easier, and requires a far lower burden of proof, than an adjudication on the underlying offense.[28]

The ABA is not asserting that all juveniles serving JLWOP sentences for homicide will establish, at some point in their sentence, that they are entitled to parole. The ABA is asserting, however, that they should not be denied that opportunity because, as children, they were given the second most severe penalty permitted by law.

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[25] *See, e.g.*, California Dept. of Corrections, *Life Parole Process*, http://www.cdcr.ca.gov/parole/ (follow link to "Lifer Parole Process") (last visited Jan. 11, 2012).

[26] *See, e.g.*, 37 Tex. Admin. Code § 145.2 (2009).

[27] *See generally*, Wendy Heller, Note, *Poverty: The Most Challenging Condition of Prison Release*, 13 Geo. J. on Poverty & Pol'y 219 (Summer 2006).

[28] *See* Alaska Admin. Code tit. 22, §20.485 (2009) (preponderance of the evidence standard sufficient to authorize decision to revoke parole).

Graham, 130 S. Ct. at 2016, citing *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

E. INTERNATIONAL AUTHORITIES DEMONSTRATE OVERWHELMING OPPOSITION TO JLWOP.

This Court has "treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Graham*, 130 S.Ct. at 2034.

A recent Amnesty International Report confirms that "[i]n the face of a virtual universal legal and moral consensus that [JLWOP] should never be used for children, the USA is the only country in the world imposing this sentence." Amnesty Int'l; *This is Where I'm Going to Die: Children Facing Life Imprisonment Without the Possibility of Release in the USA* at 1 (March 2011) (emphasis added).[29] Further, an array of international bodies oppose JLWOP.[30]

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[29] *See also Graham*, 130 S. Ct. at 2033, citing, *inter alia*, Amnesty Int'l., Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States 106, n. 322 (2005) (only the United States and Israel impose JLWOP for homicides, but noting that the Israeli parole procedure was unclear).

[30] *See e.g.* United Nations Convention on the Rights of the Child, , Sept. 2, 1990, 1577 U.N.T.S. 3, Art. 37(a) [hereinafter "CRC"]; *id.* at Art. 40.1 (supporting "the desirability of

As this Court held, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Roper*, 543 U.S. at 578.

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promoting the child's reintegration and the child's assuming a constructive role in society."); Human Rights Watch & Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* at 95 (identifying the United States and Somalia as the two countries that have not ratified the CRC, although both have signed it); *Hussain v. United Kingdom*, 22 EHRR 1, ¶ 53 (1996) (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov, 4, 1950, CETS No. 5, *available at* http://www.unhcr.org/refworld/docid/3ae6b3b04.html (last visited Jan. 11, 2012) (citing European Court of Human Rights' declaration that JLWOP is illegal under Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms); Human Rights Watch, *World Report* 107 (2005), *available at* http://www.hrw.org/legacy/wr2k5/wr2005.pdf (last visited Jan. 11, 2012) (reporting the Commission on Human Rights' April 2004 resolution urging states to abolish JLWOP); Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison*, 42 U.S.F. L. Rev. 983, 989 (2008) (citing Rights of the Child, G.A., Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006)) (reporting 185-1 U.N. General Assembly vote, with the United States the lone dissenter, calling upon nations to abolish the juvenile death penalty and JLWOP); Committee on Elimination of Racial Discrimination, Concluding Observations of the United States, ¶21, U.N. Doc. CERD/C/USA/CO/6 (Feb. 6, 2008) (reporting the U.N. Committee on the Elimination of Racial Discrimination determined that the racially disproportionate impact of JLWOP in the United States warranted recommending abolishing the sentence).

CONCLUSION

For the reasons stated above, *amicus curiae* the American Bar Association requests that the judgments below be reversed.

Respectfully submitted,

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January 17, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 10-9646, 10-9647

Supreme Court, U.S.
FILED
JAN 13 2012
OFFICE OF THE CLERK

In the
Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

(Additional Caption on the Reverse)

On Writ of Certiorari to the Alabama Court of Criminal Appeals

BRIEF FOR THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ of Certiorari to the
Supreme Court of Arkansas

QUESTION PRESENTED

Whether the Eighth Amendment's ban on cruel and unusual punishment prohibits the imprisonment of a juvenile for life without the possibility of parole as punishment for the juvenile's commission of a homicide offense.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CITED AUTHORITIES iv

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE STRUCTURAL AND FUNCTIONAL IMMATURITIES OF THE ADOLESCENT BRAIN PROVIDE A BIOLOGICAL BASIS FOR THE BEHAVIORAL IMMATURITIES EXHIBITED BY ADOLESCENTS. 4

A. ADOLESCENTS ARE LESS ABLE THAN ADULTS TO VOLUNTARILY CONTROL THEIR BEHAVIOR 5

B. RECENT STUDIES OF THE BRAIN HAVE ESTABLISHED A BIOLOGICAL BASIS FOR THE OBSERVED IMMATURITIES IN ADOLESCENT BEHAVIOR. 14

1. ADOLESCENT BRAINS ARE STRUCTURALLY IMMATURE IN AREAS OF THE BRAIN ASSOCIATED WITH ENHANCED ABILITIES OF EXECUTIVE BEHAVIOR CONTROL. .. 17

2. ADOLESCENT BRAINS TEND TO BE MORE ACTIVE THAN ADULT BRAINS IN REGIONS ASSOCIATED WITH

TABLE OF CONTENTS

Page

RISKY, IMPULSIVE, AND SENSATION-SEEKING BEHAVIOR AND LESS ACTIVE IN REGIONS ASSOCIATED WITH THE ABILITY TO VOLUNTARILY CONTROL BEHAVIOR 28

CONCLUSION 37

TABLE OF CITED AUTHORITIES

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INTERESTS OF AMICI CURIAE*

The American Medical Association. The American Medical Association (AMA) is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents and medical students are represented in the AMA's policy making process. Founded in 1847, the objects of the AMA are to promote the science and art of medicine and the betterment of public health.

The American Academy of Child and Adolescent Psychiatry. Founded in 1953, the American Academy of Child and Adolescent Psychiatry (AACAP) is comprised of over 7,500 child and adolescent psychiatrists and other interested physicians. Consistent with the focus of the juvenile court system on rehabilitation rather than retribution and multiple international treaties, including the UN Convention of Rights of the Child, the AACAP has adopted a policy statement strongly opposing the imposition of a sentence of life without

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* The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

the possibility of parole for crimes committed as juveniles. AACAP Policy Statement, June 2009, *available at* http://www.aacap.org/cs/root/policy_statements/life_without_parole_for_juvenile_offenders.

Each of the above-referenced *amici* is committed to the advancement of science. While not taking a formal position on whether sentencing a juvenile to a term of imprisonment of life without the possibility of parole violates the protections provided by the Eighth Amendment of the U.S. Constitution, *amici* submit this brief to describe the scientific findings of medical, psychiatric, and psychological research relevant to this issue.

SUMMARY OF ARGUMENT

The adolescent's mind works differently from ours. Parents know it. This Court has said it. Legislatures all over the world have presumed it for decades or more. And scientific evidence has continued to shed more light on how and why adolescent behavior differs from adult behavior.

The differences in behavior have been documented by scientists along several dimensions. Scientists have found that adolescents as a group, even at later stages of adolescence, are more likely than adults to engage in risky, impulsive, and sensation-seeking behavior. This is, in part, because they overvalue short-term benefits and rewards, and are less capable of controlling their impulses making them susceptible to acting in a reflexive rather than a

planned voluntary manner. Adolescents are also more emotionally volatile and susceptible to stress and peer influences. In short, the average adolescent cannot be expected to act with the same control or foresight as a mature adult.

Behavioral scientists have observed these differences for some time, but only recently have studies provided an understanding of the neurobiological underpinnings for why adolescents act the way they do. For example, brain imaging studies reveal that adolescents generally exhibit greater neural reactivity than adults or children in areas of the brain that promote risky and reward-based behavior. These studies also demonstrate that the brain continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible for controlling thoughts, actions, and emotions. Together, these studies indicate that the adolescent period poses vulnerabilities to risk taking behavior but, importantly, that this is a temporary stage.

While science cannot gauge moral culpability, scientists can shed light on some of the measurable attributes that the law has long treated as highly relevant to culpability and the appropriateness of punishment. This brief focuses on what science can tell us about the neurological, physiological, psychological, emotional, and behavioral development of adolescents from the perspective of researchers and medical professionals.

ARGUMENT

THE STRUCTURAL AND FUNCTIONAL IMMATURITIES OF THE ADOLESCENT BRAIN PROVIDE A BIOLOGICAL BASIS FOR THE BEHAVIORAL IMMATURITIES EXHIBITED BY ADOLESCENTS.

Although adolescents[1] can, and on occasion do, exhibit adult levels of judgment and control, their ability to do so is limited and unreliable compared to that of adults. Adolescents, as a group, value risks and rewards differently from adults, which, coupled with limitations in controlling their impulses and recognizing and regulating emotional responses, makes them vulnerable to impulsive acts. *See* Point A, *infra*.

Moreover, recent advances in brain-imaging technology confirm that the very regions of the brain that are associated with voluntary behavior control and regulation of emotional response and impulsivity are structurally immature during adolescence. Studies have also revealed that these structural immaturities are consistent with age-related differences in both brain function and behavior. *See* Point B, *infra*.

These findings have led to an "explosion of scientific papers and popular articles" about the

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[1] There is a continuum of differences in brain maturation and cognitive abilities between the youngest and oldest of adolescents. All of the scientific conclusions recounted in this brief, however, are applicable to adolescents as a class—ranging from ages 12 to 17.

immaturities of the adolescent brain and how these immaturities explain the risky and impulsive behavior exhibited by teens.[2]

A. Adolescents Are Less Able Than Adults to Voluntarily Control Their Behavior.

Numerous studies of adolescent behavior over the last two decades confirm the stereotype that adolescents, as a group, are prone to making impulsive or reactive judgments. "Relative to individuals at other ages, . . . adolescents . . . exhibit a disproportionate amount of reckless behavior, sensation seeking and risk taking."[3] Sensation-seeking peaks during adolescence across cultures and species, and is believed to be an adaptive and normal part of development that promotes learning and independence.[4]

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[2] David Dobbs, *Beautiful Brains*, 220:4 NAT'L GEOGRAPHIC 36, 48 (Oct. 2011).

[3] Linda Patia Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAV. REVS. 417, 421 n. 1 (2000); *see also* Lawrence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence of a Dual Systems Model*, 44:6 DEVELOPMENTAL PSYCHOL. 1774 (2008); B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 62-77 (2008); *see generally* Sarah Durston & B.J. Casey, *What Have We Learned About Cognitive Development from Neuroimaging?*, 44 NEUROPSYCHOLOGIA 2149 (2006); Luciana Hooper et al., *Adolescents' Performance on the Iowa Gambling Task: Implications for the Development of Decision-Making and Ventromedial Prefrontal Cortex*, 40:6 DEVELOPMENTAL PSYCHOL. 1148 (2004).

[4] Beatriz Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, *in* FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 250 (Francisco Aboitiz and Diego Cosmelli eds.,

Nevertheless, sensation-seeking behavior can result in actions that compromise survival (referred to as "risk-taking" behaviors) and involve sub-optimal decision-making. Risk-taking of all sorts — whether drunk driving, unprotected sex, experimentation with drugs, or even criminal activity — is so pervasive that "it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence."[5] The difference between adolescent and adult behavior, however, is not a function of adolescents' inability to distinguish right from wrong or in their intellectual abilities *per se*, but rather from psychosocial limitations in their ability to consistently and reliably control their behavior.[6]

Specifically, adolescents are less able, on average, than adults to self-regulate, or "cognitively" control, their behavior.[7] Cognitive control refers to the

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Springer Berlin Heidelberg 2009) (explaining that "these behaviors may be necessary to develop the social skills needed to gain independence in adulthood").

[5] Spear (2000), *supra* note 3, at 421; *see also* Casey (2008), *supra* note 3, at 65 ("[R]isk-taking appears to increase during adolescence relative to childhood and adulthood....")

[6] Elizabeth Cauffman & Lawrence Steinberg, *(Im)Maturity of Judgment in Adolescences: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000); *see also* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, *in* ADOLESCENT AND ADULT RISK TAKING: THE EIGHTH TEXAS TECH SYMPOSIUM ON INTERFACES IN PSYCHOLOGY 66, 67 (N. Bell & R. Bell eds., 1993).

[7] *See* Deborah Yurgelun-Todd, *Emotional and Cognitive Changes During Adolescence*, 17 CURRENT OPINION IN NEUROBIOLOGY 251, 253 (2007); *see also* R. K. Lenroot & Jay N. Giedd, *Brain Development in Children and Adolescents:*

ability to voluntarily exert goal-directed behavior while controlling compelling but goal-inappropriate responses.[8] Scientists have identified various interrelated immaturities in adolescents' self-regulatory abilities that contribute to their limitation in controlling their impulses and their greater tendency to engage in risky or reckless behavior. To name just a few, adolescents (1) tend to be more strongly motivated by the possibility of reward than adults; (2) have greater difficulty controlling their impulses; and (3) have greater difficulty recognizing and regulating emotional responses. We take a closer look at each of these factors below.

Reward Sensitivity. One of the main reasons adolescents are more likely to engage in risky behavior than adults is that adolescents tend to experience heightened levels of sensitivity to rewards, especially to immediate rewards.[9]

Insights from Anatomical Magnetic Resonance Imaging, 30 NEUROSCI. & BEHAV. REVS. 718, 723 (2006); Luna (2009), *supra* note 4, at 249, 51; *see also* Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 40-41 (2009) [hereinafter Steinberg, *Future Orientation*] ("[C]hanges in impulse control and planning are mediated by a 'cognitive control' network . . . which matures more gradually and over a longer period of time, into early adulthood.").

[8] *See* Luna (2009), *supra* note 4, at 251.

[9] *See* Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 16:3 ANN. REV. CLINICAL PSYCHOL. 47, 57 (2009) [hereinafter Steinberg, *Adolescent Development*]; *see also* C.F. Geier, et al., *Immaturities in Reward Processing and Its Influence on Inhibitory Control in Adolescence*, 20:7 CEREBRAL CORTEX 1613, 1624-26 (2010).

Placing a higher value on the potential reward leads to lower risk-reward ratios for adolescents, relative to adults, and thus a higher likelihood of engaging in the risky behavior.[10] In other words, adolescent behavioral research suggests that adolescents take more risks because they overvalue the potential reward, not because they are less able to appreciate the risks, as was once believed.[11] "[A]dolescents' greater involvement in risk taking, compared to adults', does not appear to stem from youthful ignorance, irrationality, delusions of invulnerability, or misperceptions of risk."[12] Rather, it appears that adolescents and adults perceive *risks* similarly[13], but they evaluate potential *rewards* differently, especially when the risky behavior is weighed against the cost.[14]

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[10] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 57-58.

[11] *Id.* at 58.

[12] Elizabeth Cauffman & Elizabeth Shulman, *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46:1 DEVELOPMENTAL PSYCHOL. 193, 194 (2010); *see also* Steinberg, *Adolescent Development*, *supra* note 9, at 57.

[13] Valerie Reyna & Charles Brainerd, *Dual Processes in Decision Making and Developmental Neuroscience: A Fuzzy-Trace Model*, 31 DEVELOPMENTAL REV. 180, 193 (2011).

[14] *See* Susan L. Andersen, *Trajectories of Brain Development: Point of Vulnerability or Window of Opportunity?* 27 NEUROSCI. AND BIOBEHAV. REVS 3, 3-18 (2003); Fulton Crews, Jun He & Clyde Hodge, *Adolescent Cortical Development: A Critical Period of Vulnerability for Addiction*, 86 PHARMACOLOGY BIOCHEMISTRY AND BEHAV. 189 (2007); Spear (2000), *supra* note 3; Cauffman & Shulman, *supra* note 12, at 206; Steinberg

Furthermore, studies have shown that adolescents are more likely to take risks when they are in the presence of peers. "[O]ne of the hallmarks of adolescent risk taking is that it is much more likely than that of adults to occur in the presence of peers, as evidenced in studies of reckless driving, substance abuse, and crime."[15] More recent studies have also shown that this increased risk taking in the presence of peers is associated with greater neural activity in the areas of the brain associated with reward processing.[16] In fact, adolescents appear to place unique reward value on the presence of peers. With adolescents, "awareness of peers selectively amplifies activity in the [] brain's incentive processing system, which in turn influences subsequent decisions about risk."[17] Adults, on the other hand, "showed no differences in the

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(2008), *supra* note 3, at 1776 (linking lack of impulse control to sensation seeking behaviors).

[15] Albert Chein, et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14:2 DEVELOPMENTAL SCI. F1, F1 (2011) (internal citations omitted); Linda Patia Spear, *Rewards, Aversions and Affect in Adolescence: Emerging Convergences Across Laboratory Animal and Human Data*, 1 DEVELOPMENTAL COGNITIVE NEUROSCI. 390, 400 (2011).

[16] *See* Chein, *supra* note 15, at F7. These areas include the ventral striatum and orbitofrontal cortex. *Id.* at F1, F7 ("Specifically, relative to adults, adolescents demonstrated significantly greater activation of VS and OFC as they rendered decisions about risk, but only when they were aware that friends were watching them.").

[17] *Id.* at F8.

activation of these regions as a function of social context."[18]

Impulse Control. "A cornerstone of cognitive development is the ability to suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."[19] Impulse control means allowing a goal-directed response to override a more compelling/reflexive, yet goal-inappropriate response.[20] The ability to control one's impulsive reactions to an event or problem is necessary to achieve adult levels of problem solving ability, logical reasoning, and the consistent exercise of good judgment.[21]

Adolescents have observable limitations in their ability to control their impulses. The relative inability of adolescents to control impulsive behavior is well-documented by studies on developmental changes in impulsivity and self-management over the course of adolescence.[22] "A number of classic developmental studies have shown that this ability develops throughout

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[18] *Id.* at F7.

[19] *See* Casey (2008), *supra* note 3, at 64.

[20] *See* Luna, *supra* note 4, at 251.

[21] *See id.*

[22] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 58; *see also* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 DEVELOPMENTAL PSYCHOL. 1531, 1538 (2007); Steinberg (2008), *supra* note 3, at 1772-74.

childhood and adolescence."[23] Capacity for self-direction has been shown to increase gradually throughout adolescence and into young adulthood.[24] Likewise, impulsivity tends to decline linearly from childhood to adulthood.[25] These findings indicate that adolescents have not yet attained adult levels of impulse control. In other words, adolescents are less able than adults to consistently reflect before they act.

Emotional Regulation. All individuals regulate their emotional responses to events. They increase or decrease their emotional reactions to stimuli in accordance with their behavioral goals.[26] The ability to regulate one's emotions efficiently is crucial for mental and physical health as well as for appropriate social interactions, and impairment of this capability is associated with affective disorders and a variety of other maladaptive psychological conditions.[27] This ability, however, continues to develop through adolescence into adulthood.[28] As a result,

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[23] *See* Casey (2008), *supra* note 3, at 64.

[24] *See* Steinberg, *Future Orientation*, *supra* note 7, at 28-29, 38-40.

[25] Steinberg (2008), *supra* note 3, at 1776; *see* Steinberg, *Adolescent Development*, *supra* note 9, at 57.

[26] *See* Sang Hee Kim & Stephan Hamann, *Neural Correlates of Positive and Negative Emotion Regulation*, 19:5 J. COGNITIVE NEUROSCI. 776 (2007); Kelly Anne Barnes et al., *Developmental Differences in Cognitive Control of Socio-Affective Processing*, 32:3 DEVELOPMENTAL NEUROPSYCHOL. 787 (2007).

[27] *Id.* at 776.

[28] *See* Casey (2008), *supra* note 3, at 65.

similar to their ability to control impulses, adolescents have less ability to regulate their emotional responses to stimuli than adults.[29]

This relative limitation is important for understanding adolescents' ability to voluntarily control their behavior. Indeed, many situations, particularly those involving social interactions, arouse adolescents' emotional system and impact their ability to make informed decisions about their actions. Peer pressure, for example, can arouse emotions of fear, rejection, or desire to impress friends that can undermine the reliability of adolescent behavioral control systems and result in actions taken without full consideration or appreciation of the consequences.[30]

Each of these attributes continues to develop throughout adolescence and early adulthood, and is critical to the ability to effectively and consistently control one's behavior.[31] The developmental immaturities that adolescents

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[29] Isabelle M. Rosso et al., *Cognitive and Emotional Components of Frontal Lobe Functioning in Childhood and Adolescence*, 1021 ANNALS N.Y. ACAD. SCI. 355, 360-61 (2004); *see also, e.g.*, Todd A. Hare et al., *Biological Substrates of Emotional Reactivity and Regulation in Adolescence During an Emotional Go-Nogo Task*, 63:10 BIOLOGICAL PSYCHIATRY 927 (2008) (adolescents show exaggerated responses in subcortical brain regions involved in emotional behaviors, which is associated with risk taking and heightened emotional responses to empty threats).

[30] *See* Steinberg (2007), *supra* note 22, at 1536-38 (explaining that "resistance to peer influence increases linearly over the course of adolescence, especially between ages 14 and 18").

[31] *See* Casey (2008), *supra* note 3, at 68.

exhibit with respect to each of these attributes compound to make them particularly prone to engage in risky and sensation-seeking behavior.

Researchers have also found that these limitations are especially pronounced when other factors — such as stress, emotions, and peer pressure — enter the equation. These factors affect everyone's cognitive functioning, but they operate on the adolescent mind differently and with special force.

The interplay among stress, emotion, cognition, and voluntary behavior control in teenagers is particularly complex — and different from adults. Stress affects the ability to effectively regulate behavior as well as the ability to weigh costs and benefits and override impulses with rational thought.[32] Adolescents are more susceptible to stress from daily events than adults, which translates into a further distortion of their already skewed cost-benefit analysis.[33]

Emotion, like stress, also plays an important role in the ability to voluntarily control behavior, influencing decision-making and risk-taking behavior.[34] Because of their greater stress,

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[32] *See* Spear (2000), *supra* note 3, at 423; Lita Furby & Ruth Beyth-Maron, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 22 (1992).

[33] *See* Spear (2000), *supra* note 3, at 423; Furby, *supra* note 32, at 22.

[34] *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished*

greater influx of gonadal hormones, and their relative inability to consistently regulate their emotional responses, adolescents are more emotionally volatile than adults — and children, for that matter.[35] As a result, adolescents tend to experience emotional states that are more extreme and more variable than those experienced by adults.[36]

In sum, the conclusion of the scientific research is that, for a variety of interrelated reasons, adolescents, as a group, cannot be expected to behave or make decisions in the same way as adults.

B. Recent Studies of the Brain Have Established a Biological Basis for the Observed Immaturities in Adolescent Behavior.

Modern brain research technologies have developed a body of data from the late 1990s to the present that provides a compelling picture of the inner workings of the adolescent brain.[37]

Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOL. 1009, 1011-13 (2003).

[35] *See* Spear (2000), *supra* note 3, at 429.

[36] *See id.*; Cauffman (2000), *supra* note 6, at 743-45, 756-57, 59.

[37] *See* Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?* 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012, 1012 (2001) (reviewing results of MRI studies of brain development in childhood and adolescence); Michael S. Gazzaniga et al., COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND 20-21, 138 (2d ed. 2002).

Indeed, brain imaging data provides convergent evidence for the ways in which adolescents are still immature.[38] Developmental neuroscience has now gathered extensive evidence that both the structure of the adolescent brain, and the way it functions, are immature compared to the adult brain.

This insight emerges from sophisticated and non-invasive brain imaging techniques performed by high-resolution structural and functional magnetic resonance imaging ("MRI") methods.[39] These imaging techniques are a quantum leap beyond previous methods for assessing brain development. Before the rise of neuroimaging, the understanding of brain development was gleaned

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[38] *See* Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. NAT'L ACAD. SCI. 8174, 8177 (2004).

[39] "MRI measures the response of atoms in different tissues when they are pulsed with radio waves that are under the influence of magnetic fields thousands of times the strength of the Earth's. Each type of tissue responds differently, emitting characteristic signals from the nuclei of its cells. The signals are fed into a computer, the position of those atoms is recorded, and a composite picture of the body area being examined is generated and studied in depth." Florence Antoine, *Cooperative Group Evaluating Diagnostic Imaging Techniques*, 81 J. NAT'L CANCER INST. 1347, 1348 (1989); *see also* Yurgelun-Todd, *supra* note 7, at 251-52 (explaining that "structural MRI and functional MRI (fMRI), have become important modalities for research on brain development as they have been able to provide a more detailed picture of how the brain changes. The application of these methods to the study of children and adolescents provides an extraordinary opportunity to advance our understanding of neurobiological changes and functional abilities associated with the brain.")

largely from post-mortem examinations.[40] Modern imaging techniques, however, have begun to shed light on how a live brain operates, and how a particular brain develops over time.[41]

Technological breakthroughs have not only enabled scientists to confirm some of what was previously known or believed, but have also provided new evidence that has changed the way scientists understand the development of the human brain as it progresses from childhood through adolescence and into adulthood.[42] "[B]rain imaging studies in normal children and adolescents have been helpful in relating the dramatic maturation of cognitive, emotional, and social functions with the brain structures that ultimately underlie them."[43]

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[40] *See* Gazzaniga, *supra* note 37, at 63.

[41] *See generally* Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCI. 8819 (2001).

[42] *See* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCI. 859 (1999); *see also* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCI. 861 (1999).

[43] Elizabeth R. Sowell et al., *Mapping Cortical Change Across the Human Life Span*, 6 NATURE NEUROSCI. 309 (2003); *see also* Gogtay, *supra* note 38, at 8177.

In this regard, two complementary observations have been especially revealing. First, the parts of the brain that work together to support the control of behavior, including the prefrontal cortex (which comprises roughly the front third of the human brain), continue to mature even through late adolescence.[44] Second, in making behavioral choices, adolescents rely more heavily than adults on systems and areas of the brain that promote risk-taking and sensation-seeking behavior.

1. Adolescent Brains Are Structurally Immature in Areas of the Brain Associated with Enhanced Abilities of Executive Behavior Control.

When it comes to "response inhibition, emotional regulation, planning and organization," the so-called executive functions, a crucial part of the brain is the prefrontal cortex.[45] The prefrontal cortex is a core region that through its ability to integrate information across the brain supports

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[44] *See* Casey (2008), *supra* note 3, at 68.

[45] Sowell (1999), *supra* note 42, at 860; *see* Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12:1 DEVELOPMENTAL SCI. 55, 56 (2009) (explaining that "[n]europsychological and neuroimaging studies have shown that prefrontal cortex is strongly implicated in relational reasoning."); *see also* Gazzaniga, *supra* note 37, at 75; Rosso, *supra* note 29, at 360-61 (finding a correlation between frontal lobe development in adolescents, response inhibition and social anxiety levels); *see generally*, Silvia A. Bunge et al., *Immature Frontal Lobe Contributions to Cognitive Control in Children: Evidence from fMRI*, 33 NEURON 301 (2002).

planning of voluntary goal-directed responses and can exert control over more impulsive brain systems. As such, it is associated with a variety of cognitive abilities,[46] including those associated with voluntary behavior control and inhibition[47] such as risk assessment,[48] evaluation of reward and punishment,[49] and impulse control.[50] More generally, other functions associated with the prefrontal cortex include decision-making,[51] the

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[46] *See* B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 BIOLOGICAL PSYCHOL. 241, 244 (2000).

[47] *See* R. Dias et al., *Dissociable Forms of Inhibitory Control Within Prefrontal Cortex with an Analog of the Wisconsin Card Sort Test: Restriction to Novel Situations and Independence from "On-Line" Processing*, 17 J. NEUROSCI. 9285 (1997); Durston, *supra* note 37, at 1016; *see also* Yurgelun-Todd, *supra* note 7, at 253.

[48] *See* Facundo Manes et al., *Decision-Making Processes Following Damage to the Prefrontal Cortex*, 125 BRAIN 624 (2002).

[49] *See* J. O'Doherty et al., *Abstract Reward and Punishment Representations in the Human Orbitofrontal Cortex*, 4 NATURE NEUROSCI. 95 (2001); Robert D. Rogers et al., *Choosing Between Small, Likely Rewards and Large, Unlikely Rewards Activates Inferior and Orbital Prefrontal Cortex*, 20 J. NEUROSCI. 9029 (1999).

[50] *See* Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189, 2198-99 (2000).

[51] *See* Samantha B. Wright et al., *Neural Correlates of Fluid Reasoning in Children and Adults*, 1:8 FRONTIERS HUMAN NEUROSCI. 7 (2008) (finding that important changes in the prefrontal cortex during adolescence lead to the development of logical reasoning abilities); *see also* Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. NEUROSCI. 428 (1998).

ability to judge and evaluate future consequences,[52] recognizing deception,[53] responses to positive and negative feedback,[54] working memory,[55] and making moral judgments.[56]

The brain's frontal lobes are still structurally immature well into late adolescence,[57] and the prefrontal cortex is "one of the last brain regions to mature."[58] This, in turn, means that "response inhibition," emotional regulation, planning and

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[52] *See* Bechara (2000), *supra* note 50.

[53] *See* D. D. Langleben et al., *Brain Activity During Simulated Deception: An Event-Related Functional Magnetic Resonance Study*, 15 NEUROIMAGE 727 (2002).

[54] *See* R. Elliott et al., *Differential Neural Response to Positive and Negative Feedback in Planning and Guessing Tasks*, 35 NEUROPSYCHOLOGIA 1395 (1997).

[55] *See* Luna, *supra* note 4, at 264.

[56] *See* Jorge Moll et al., *Frontopolar and Anterior Temporal Cortex Activation in a Moral Judgment Task: Preliminary Functional MRI Results in Normal Subjects*, 59 ARQ NEUROPSIQUIATR 657 (2001); Steve W. Anderson et al., *Impairment of Social and Moral Behavior Related to Early Damage in Human Prefrontal Cortex*, 2 NATURE NEUROSCI. 1032 (1999).

[57] *See* Gogtay, *supra* note 38, at 8174 (subjects of study aged 4 to 21 years); Giedd (1999), *supra* note 42, at 861 (subjects of study aged 4.2 to 21.6 years); Sowell (1999), *supra* note 42, at 860-61 (subjects of study aged 12 to 16 and 23 to 30 years); *see also* Sowell (2001), *supra* note 41, at 8826 (noting pronounced brain maturational processes continuing into post-adolescence; subjects of study aged 7 to 30 years); Sowell (2003), *supra* note 43, at 309 (subjects of study aged 7 to 87 years).

[58] Casey (2000), *supra* note 46, at 243; *see also* Gogtay, *supra* note 38, at 8175.

organization . . . continue to develop between adolescence and young adulthood."[59]

The adolescent brain, in particular the frontal lobes and specifically the prefrontal cortex, is immature in at least two distinct ways that directly affect an adolescent's ability to cognitively control behavior. First, the gray matter where neuronal brain cells reside continues to mature, supporting complex neural processing needed for generating cognitive plans. Second, the integrity of white matter neuronal connections, which supports the fast connectivity needed to executively control impulsive responses, is still improving. Maturation of processes in the gray and white matter of the brain support the complex information processing that underlies executive voluntary control of behavior, which underlies decreased risk taking in adulthood. When fully mature, the ability to effectively process complex information and quickly affect behavior supports the adult's ability to make better-informed executive decisions.[60]

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[59] Sowell (1999), *supra* note 42, at 860; *see also* Kenneth E. Towbin & John E. Schowalter, *Adolescent Development*, *in* PSYCHIATRY 145, 151-52 (Allan Tasman ed., 2d ed. 2003).

This paper recognizes the link between "improvement during adolescence in specific cognitive skills such as organizing information, conceptualization, perspective taking, and social perception, to structural changes in frontal cortical and subcortical structures." *Id.* at 152.

[60] *See* Steven Petersen et al., *Functional Brain Networks Develop from a "Local to Distributed" Organization*, 5:5 PLoS COMPUTATIONAL BIOLOGY 1, 8 (2009) (increased connectivity

Pruning. The gray matter of the brain is where brain cell "neurons" reside and includes the top layer of the brain and also the nuclei within the brain.[61] As the brain matures, gray matter *thins*[62] through processes called synaptic pruning, which is the programmed elimination of unused and cumbersome neuronal connections believed to support the ability for the brain to adapt to its environment. Just as the pruning of a rose bush strengthens the remaining branches, the pruning of excess connections leads to greater efficiency and strengthening of the ability for complex information processing that support consistent exercise of good judgment.[63] Maturational improvements in the gray matter continue to take

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"promote[s] interactions between brain regions . . . allowing for a more effective 'solution' to any particular set of processing demands").

[61] *See* Gazzaniga, *supra* note 37, at 64-65; *see* Eric R. Kandel et al., PRINCIPLES OF NEURAL SCIENCE 9 (James H. Schwartz & Thomas M. Jessel, eds., McGraw-Hill 2000).

[62] *See* Durston, *supra* note 37, at 1014; Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging of Typically Developing Children and Adolescents*, 48:5 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 465, 469 (2009); Gogtay, *supra* note 38, at 8174 (10 year study of gray matter loss showed continued gray matter loss until adulthood).

[63] *See* Robert F. McGivern et al., *Cognitive Efficiency on a Match to Sample Task Decreases at the Onset of Puberty in Children*, 50 BRAIN & COGNITION 73 (2002) (subjects of study aged 10 to 22 years); Casey, *supra* note 46, at 241 ("findings are consistent with the view that increasing cognitive capacity during childhood coincides with a gradual loss rather than formation of new synapses . . ."); *see also* Daniel J. Siegel, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 13-14 (Guilford Press 1999).

place through adolescence and into adulthood.[64] Thus, changes in gray matter, including pruning, enhance the ability to process complex information quickly allowing the brain to make executive plans supporting voluntary control of behavior.

Scientists have known about pruning for decades,[65] but modern brain imaging technology has provided important insights into the process.[66] Until MRI technology emerged, the common wisdom was that the volume of gray matter spurted only once, shortly after birth, and then declined gradually over time. Brain scans have revealed a more complicated reality: In particular regions of the brain, gray matter blossoms once again later in childhood.[67] Gray matter volumes

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[64] *See* Gogtay, *supra* note 38, at 8175.

[65] *See generally* Peter R. Huttenlocher, *Synaptic Density in Human Frontal Cortex: Developmental Changes and Effects of Aging*, 163 BRAIN RES. 195 (1979).

[66] *See, e.g.*, Sowell (2002), *supra* note 41, at 4.

[67] *See* McGivern, *supra* note 63, at 85; *see also* David N. Kennedy et al., *Basic Principles of MRI and Morphometry Studies of Human Brain Development*, 5 DEVELOPMENTAL SCI. 268, 274 (2002).

> Studies showed . . . nonlinear changes in cortical gray matter, summarized as a preadolescent increase followed by a postadolescent decrease. Further localization of these changes indicated that the frontal and parietal lobe peaked at about age 12, the temporal lobe at about age 16, and the occipital lobe continued its increase through age 20, although the confidence intervals on these observations are large.

peak during the ages from 10-20 years,[68] and the prefrontal cortex is one of the places where gray matter increases — before adolescence — and then gets pruned over time, beyond adolescence.[69] The prefrontal cortex is also one of the last regions where pruning is complete and this region continues to thin past adolescence.[70] This means that one of the last areas of the brain to reach full maturity, as measured by pruning, is the region most closely associated with risk assessment, impulse control, emotional regulation, decision-making, and planning — in other words, the ability to reliably and voluntarily control behavior.[71]

Myelination. Another important measure of brain maturity is myelination.[72] Myelination is

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Giedd (1999), *supra* note 42, at 861.

[68] *See* Giedd (1999), *supra* note 42, at 861; McGivern, *supra* note 63, at 85; Yurgelun-Todd, *supra* note 7, at 252, 55.

[69] *See* Jay N. Giedd, *The Teen Brain: Insights from Neuroimaging*, 42 J. ADOLESCENT HEALTH 335, 339 (2008).

[70] A study by the National Academy of Sciences measured gray matter density in individuals longitudinally from childhood to early adulthood and concluded that "the [gray matter] maturation ultimately involves the dorsolateral prefrontal cortex, which loses [gray matter] only at the end of adolescence." Gogtay, *supra* note 38, at 8175.

[71] *See id.* at 8177 (explaining that "[l]ater to mature were areas involved in executive function"); *see also* Michael C. Stevens et al., *Functional Neural Networks Underlying Response Inhibition in Adolescents and Adults*, 181 BEHAV. BRAIN RESEARCH 12 (2007).

[72] *See* Elkhonon Goldberg, THE EXECUTIVE BRAIN: FRONTAL LOBES & THE CIVILIZED MIND 144 (Oxford Univ. Press, 2001);

the process by which the brain's axonal connections become progressively insulated with a fatty white matter called myelin. Myelin surrounds the axons, which are neural fibers that use electrical impulses to carry information across long distances, and insulates the pathway, speeding the neural signal along the pathway.[73] "The presence of myelin makes communication between different parts of the brain faster and more reliable."[74] Myelination of "white matter"[75] continues through adolescence and into adulthood.[76]

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see also Sowell (2001), *supra* note 41, at 8819; Sowell (2003), *supra* note 43, at 311; Yurgelun-Todd, *supra* note 7, at 253.

[73] *See* Zoltan Nagy, Helena Westerberg & Torkel Klingberg, *Maturation of White Matter is Associated with the Development of Cognitive Functions During Childhood*, 16:7 J. COGNITIVE NEUROSCI. 1227, 1231-32 (2004) (explaining that "the physiological effects of increases in axon thickness and myelination are similar in that they both increase conduction speed."); Gazzaniga, *supra* note 36, at 31, 48-49.

[74] Goldberg, *supra* note 72, at 144.

[75] White matter is the tissue that composes the pathways between brain regions and that permits communication and interaction within the brain and between the brain and the body. *See* Gazzaniga, *supra* note 37, at 70, 72. For example, the corpus callosum, a critical white matter structure, bridges the two halves of the frontal lobes, permitting and regulating communication between the two halves of the brain. *See* Tomas Paus et al., *Structural Maturation of Neural Pathways in Children and Adolescents: In Vivo Study*, 283 SCIENCE 1908 (1999).

[76] M. R. Asato et al., *White Matter Development in Adolescence: A DTI Study*, 20:9 CEREBRAL CORTEX 2122, 2125 (2010) ("In agreement with other studies, we found evidence for continuing maturation of white matter throughout distributed brain

The integrity of the white matter, including myelination, matures at different rates across the brain.[77] Brain imaging data, supported by data gathered through the original histological (autopsy) techniques,[78] provides credible evidence that the connections from the prefrontal cortex are still developing well into adolescence and beyond, and are among the last pathways of the brain to mature.[79] In other words, maturation of prefrontal connectivity associated with voluntary behavior control (*i.e.*, risk assessment, impulse control, and emotional regulation) is not complete until late adolescence or beyond. Myelination also increases the efficiency of information processing and supports the integration of the widely

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regions from childhood into adulthood.") (internal citations omitted); *see* Nagy, Westerberg & Klingberg, *supra* note 73, *at* 1231-32; Durston, *supra* note 37, at 1014; Sowell (1999), *supra* note 42, at 860; Adolf Pfefferbaum et al., *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES OF NEUROLOGY 874, 885 (1994) (after age 20 white matter volume did not fluctuate until about age 70; subjects of study aged 3 months to 70 years).

[77] *See* Sowell (2003), *supra* note 43, at 311; Sowell (2002), *supra* note 41, at 4; Towbin & Schowalter, *supra* note 59, at 151.

[78] *See* Paus, *supra* note 75, at 1908.

[79] *See* Gogtay, *supra* note 38 *at* 8177 (noting that different parts of the brain undergo myelination and pruning at different rates, and finding that the higher-order cortices mature later than lower-order cortices."); *see also* Sowell (1999), *supra* note 42, at 859; K. Rubia et al., *Functional Frontalisation with Age: Mapping Neurodevelopmental Trajectories with fMRI*, 24 NEUROSCI. & BIOBEHAV. REVS. 13 (2000) (subjects of study aged 12 to 19 and 22 to 40 years).

distributed circuitry needed for complex behavior.[80] These structural changes are believed to underlie the functional integration (discussed below) of frontal regions with the rest of the brain.[81] The functional improvement of the connections between the various regions of the brain is believed to result from myelination that occurs during adolescence and is necessary for improved abilities of reliable self-control and better decision-making.[82] Efficient connectivity is needed for cognitive regions to interact with regions processing emotion, rewards, and social information in a timely and effective manner in order to control responses for optimal decision making. For example, recent research on the neural underpinnings of resistance to peer influence in adolescence indicates that improvements in this capacity may be linked to the development of greater connectivity between brain regions, and likely facilitates the better coordination of affect and cognition.[83] More generally, however, the development of improved self-regulatory abilities during and after adolescence is positively correlated with white matter maturation.[84]

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[80] *See* Luna (2009), *supra* note 4, at 257.

[81] *See id.; see also* Giedd (2009), *supra* note 62, at 467.

[82] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 56; Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function: fMRI Studies of the Development of Response Inhibition*, 1021 ANNALS N.Y. ACAD. SCI. 296, 296-309 (2004); Damien A. Fair et al., *Development of Distinct Control Networks Through Segregation and Integration*, 104 PROC. NAT'L ACAD. SCI. U.S. 13507 (2007).

[83] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 56.

[84] *See* Nagy, Westerberg & Klingberg, *supra* note 73, at 1231-32.

Top-Down Connectivity. Recent studies have shown that "development of top-down effective connectivity from cognitive control regions is critical in supporting active inhibitory control."[85] Top-down connectivity refers to the ability for executive regions, such as in the prefrontal cortex, to exert executive control on response regions.[86] fMRI has shown that the strength and number of top down functional connections continues to increase into adulthood. In addition, the organization of functional brain connections forming networks continues to optimize into adulthood.[87] These results are supported by studies measuring the integrity of structural white matter pathways, which show protracted development of the connections between the prefrontal cortex and subcortical regions of the brain areas that support cognitive control.[88] The protracted development of top-down connectivity therefore "may reflect a period of particular vulnerability to both the peak in risk-taking behavior during adolescence and the emergence and exacerbation of psychopathology, which is associated

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[85] Kai Hwang et al., *Strengthening of Top-Down Frontal Cognitive Control Networks Underlying the Development of Inhibitory Control: A Functional Magnetic Resonance Imaging Effective Connectivity Study*, 30:46 J. NEUROSCI. 15535, 15543 (2010).

[86] *Id.* at 15542.

[87] *Id.*; Nico Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCIENCE 1358, 1360-61 (2010) (brain continues to mature until 22 years of age, with region of brain most highly correlated to brain maturity was pre-frontal cortex).

[88] Asato, *supra* note 76 at 2128; Petersen, *supra* note 60, at 8.

with abnormalities in reward processing and cognitive control."[89]

2. Adolescent Brains Tend to Be More Active Than Adult Brains in Regions Associated With Risky, Impulsive, and Sensation-Seeking Behavior and Less Active in Regions Associated with the Ability to Voluntarily Control Behavior.

The brain is a complex network of interrelated parts. Each part is associated with different functions and works in conjunction with other parts to form systems. In general, the two neurobiological systems that inform our understanding of adolescent behavior, as discussed above in Point A, are (1) the motivational system, which includes the limbic and paralimbic regions of the brain; and (2) the cognitive control system, which is primarily comprised of the prefrontal cortex and its connections to the rest of the brain.[90] The differences between adolescent and adult behavior correlate with their respective and disparate reliance on each of these systems and their related brain structures.[91]

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[89] Asato, *supra* note 76, at 2128; *see* Spear (2011), *supra* note 15, at 391 (top-down control gradually gains a "competitive edge" over "'bottom-up' systems that express exaggerated reactivity to motivational stimuli").

[90] *See* Steinberg, *Adolescent Development*, *supra* note 9, at 54.

[91] Stephanie Burnett et al., *Development During Adolescence of the Neural Processing of Social Emotion*, 21:9 J. COGNITIVE

The structural immaturities of the adolescent brain discussed above represent only one dimension of the immaturity of the adolescent brain. Developmental neuroimaging studies demonstrate that the regions of the brain associated with voluntary behavior control mature structurally at the same time as specific changes in how the brain functions.[92] These findings reveal that adolescents and adults exhibit different patterns of brain activity during decision-making tasks and provide insight into the neural underpinnings of the risky, impulsive, and sensation-seeking behavior of adolescents.[93]

Studies show that the motivational system, which underlies risky and reward-based behavior, develops earlier than the cognitive control system, which regulates such behavior. Furthermore, during adolescence, the motivational system

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NEUROSCI. 173 (2009); S. J. Blakemore, *Adolescent Development of the Neural Circuitry for Thinking About Intentions*, 2:2 SOC. COGNITIVE & AFFECTIVE NEUROSCI. 130 (2007).

[92] Amy L. Krain et al., *An fMRI Examination of Developmental Differences in the Neural Correlates of Uncertainty and Decision Making*, 47:10 J. CHILD PSYCHOL. & PSYCHIATRY 1023, 1024 (2006); *see also* Liston C. Watts et al., *Frontostriatal Microstructure Predicts Individual Differences in Cognitive Control*, 16:4 CEREBRAL CORTEX 553 (2006); B.J. Casey et al., *Contribution of Frontostriatal Fiber Tracts to Cognitive Control in Parent–Child Dyads with ADHD*, 164:11 AM. J. PSYCHIATRY 1729 (2007).

[93] Krain, *supra* note 92; *see also* Adriana Galvan et al., *Earlier Development of the Accumbens Relative to Orbitofrontal Cortex Might Underlie Risk-Taking Behavior in Adolescents*, 26:25 J. NEUROSCI. 6885 (2006); *see* Hare, *supra* note 29.

continues to develop more quickly than the cognitive control system.[94] The result is that adolescents experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior.

The earlier development of the motivational system is evident in a number of areas of the brain. Among these are the amygdala and the nucleus accumbens which, in conjunction with specific neurochemical imbalances in the adolescent brain (see below), contribute to the relative dominance of the adolescent motivational system.

Amygdala. The amygdala is associated with aggressive and impulsive behavior.[95] The

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[94] *See* Steinberg, Adolescent Development, *supra* note 9, at 54; *see also* Monique Ernst et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 199 (2009).

[95] *See generally* Jan Gläscher & Ralph Adolphs, *Processing of the Arousal of Subliminal and Supraliminal Emotional Stimuli by the Human Amygdala*, 23 J. NEUROSCI. 10274 (2003); Ralph Adolphs, *Neural Systems for Recognizing Emotion*, 12 CURRENT OPINION IN NEUROBIO. 169 (2002); Gazzaniga, *supra* note 37, at 553-72; K. Luan Phan et al., *Functional Neuroanatomy of Emotion: A Meta-Analysis of Emotion Activation Studies in PET and fMRI*, 16 NEUROIMAGE 331, 336 (2002); Goldberg, *supra* note 72, at 31; Kevin S. LaBar et al., *Human Amygdala Activation During Conditioned Fear Acquisition and Extinction: A Mixed-Trial fMRI Study*, 20 NEURON 937 (1998); Richard D. Lane et al., *Neuroanatomical Correlates of Pleasant and Unpleasant Emotion*, 35 NEUROPSYCHOLOGIA 1437, 1441 (1997); Hans C. Breiter et al., *Response and Habituation of the*

amygdala is "a neural system that evolved to detect danger and produce rapid protective responses without conscious participation."[96] It dictates instinctive gut reactions, including fight or flight responses.[97] The amygdala is also a key component of circuitry involved in assessing salience, or the importance of environmental stimuli to survival, and is generally associated with processing emotional responses to a perceived danger.[98]

The prefrontal cortex — the primary region associated with self-regulation and the cognitive control system — modulates function in the amygdala[99] to which it is strongly connected.[100] A

Human Amygdala During Visual Processing of Facial Expression, 17 NEURON 875 (1996); Steinberg, *Future Orientation*, *supra* note 7, at 40.

[96] Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1, 1 (1999) (study found that adolescents 12-17 years old showed significant amygdala activation in response to a task that required the judgment of fearful facial affect); *see also* William D.S. Killgore & Deborah Yurgelun-Todd, *Activation of the Amygdala and Anterior Cingulate During Nonconscious Processing of Sad Versus Happy Faces*, 21 NEUROIMAGE 1215 (2004); Phan, *supra* note 95, at 336.

[97] *See* Goldberg, *supra* note 76, at 31; Phan, *supra* note 95, at 336.

[98] *See* Giedd (2008), *supra* note 69, at 338.

[99] *See* Mario Beauregard et al., *Neural Correlates of Conscious Self-Regulation of Emotion*, 21 J. NEUROSCI. 165RC (2001); Ahmad Hariri et al., *Modulating Emotional Responses: Effects of a Neocortical Network on the Limbic System*, 11 NEUROREPORT 43 (2000).

still-maturing prefrontal cortex exerts less control over the amygdala and has less influence over behavior and emotions than a fully mature prefrontal cortex.[101]

Nucleus Accumbens. The nucleus accumbens, a brain region rich in dopamine, is associated with reward processing. Its primary function is to process responses to a potential reward.[102] Studies show that when making decisions, "relative to children and adults, adolescents show exaggerated activation of the accumbens, in concert with less mature recruitment of top-down prefrontal control."[103] This exaggerated activity is consistent with the tendency of adolescents to overvalue rewards in risk-reward assessment and provides a

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[100] Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125-26 (1999); *see also* Joseph LeDoux, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE 303 (1996).

[101] *See* Neir Eshel et al., *Neural Substrates of Choice in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270, 1270-71 (2007) (reporting prefrontal brain areas associated with higher-order cognition, emotional regulation, reward values, and behavior control are some of the last to mature and that this lag in maturation may explain why adolescents demonstrate poor decision-making); *see also* Gargi Talukder, *Decision-Making Is Still a Work in Progress for Teenagers*, Report dated July 2000 at http://www.brainconnection.com; *see also* Spear (2000), *supra* note 3, at 440 (reporting Dr. Yurgelun-Todd's research); *see also* Ralph Adolphs et al., *Fear and the Human Amygdala*, 15 J. NEUROSCI. 5879, 5889 (1995).

[102] Galvan, *supra* note 93, at 6890.

[103] *See* Casey, *supra* note 3, at 69.

neurobiological basis for the "increased impulsive and risky behaviors observed during [adolescence]."[104]

The nucleus accumbens, which is found in the ventral striatum, is a "critical node" in the reward related neurocircuitry of the brain, contributing to directing behavior toward appropriate goals by consolidating contextual and goal directed information from other areas of the brain.[105] Developmental studies have shown hyperactivity in the ventral striatum during anticipation of rewards in adolescents, as compared to adults.[106] In parallel with increased reward reactivity in the ventral striatum, these studies have found increased engagement of the regions that support the behavior that leads to the reward. Increased reactivity to rewards paired with increased engagement of response regions can lead to an impulsive reaction in the presence of rewards in adolescence.[107] Such increased reactivity, coupled with other aspects of the developing brain, is

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[104] *See id.* at 69-70.

[105] Spear (2011), *supra* note 15, at 392; *see* Chein, *supra* note 15, at F1 (the ventral striatum is part of the "incentive processing system in the brain").

[106] *See* Geier, *supra* note 9, at 1625; Aarthi Padmanabhan et al., *Developmental Changes in Brain Function Underlying the Influence of Reward Processing on Inhibitory Control*, 1 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 517, 526 (2011), Spear (2011); *supra* note 15, at 394 (adolescents have been reported by a number of groups to show heightened activation of the ventral striatum during *receipt* of rewards relative to younger and/or older individuals").

[107] Geier, *supra* note 9, at 1626; Padmanabhan, *supra* note 106, at 523.

thought to potentially contribute to the high rate of risk taking in adolescence.[108]

Dopamine and Serotonin. Dopamine is a neurotransmitter that underlies pleasure and motivation.[109] Around the time of puberty, adolescents experience "a rapid and dramatic increase in dopaminergic activity within the motivational system."[110] Because dopamine plays a critical role in the brain's reward circuitry this increase in activity is likely to promote reward-seeking behavior.[111] At the same time, adolescents have correspondingly lower levels of serotonin, a neurotransmitter known to support inhibitory control.[112] This imbalance between lower levels of serotonin and higher levels of dopamine

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[108] Padmanabhan, *supra* note 106, at 527; Chein, *supra* note 15, at F1 ("Many research groups . . . have posited that adolescents' relatively greater propensity toward risky behavior" is based in part on the "*incentive processing* system involving the ventral striatum") (emphasis in original).

[109] *See* Andersen, *supra* note 14, at 3-18; Crews, He & Hodge, *supra* note 14, at 189-99; Spear (2000), *supra* note 3, at 417-63.

[110] Steinberg, *Adolescent Development*, *supra* note 9, at 54.

[111] *Id.* at 258; *see* Luna, *supra* note 4, at 258. Moreover, "[t]here is evidence that changes in the density and distribution of receptors for dopamine . . . within regions critical to incentive processing take place around the time of puberty, and that these changes coincide with a dramatic elevation in the salience of peer interactions." Chein *supra* note 15, at F8.

[112] *See* Luna, *supra* note 4, at 258; R. Andrew Chambers, Jane R. Taylor & Marc N. Potenza, *Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability*, 160 AM. J. PSYCHIATRY 1041 (2003).

during adolescence is believed to underlie risky and impulsive decision making by adolescents.

In addition to motivation, dopamine also plays a crucial role in reinforcement learning. Thus, the adolescent period does not only include heightened motivation but also a greater capacity for learning[113] having implications for enhanced amenability for rehabilitation in the adolescent period compared to adulthood.

In sum, adolescent behavior is characterized by a hyperactive reward-driven system (involving the nucleus accumbens and increased dopamine), a limited harm-avoidant system (involving the amygdala), and an immature cognitive control system (involving the prefrontal cortex and decreased serotonin).[114] As a result, adolescent behavior is more likely to be impulsive and motivated by the possibility of reward, with less self-regulation and effective risk assessment. In other words, the adolescent brain is biologically biased to engage in exploring new environments and experiences which can involve taking risks.

Adolescence is a time of great physiological and psychological development. It is also a time marked by impulsive, risky, and sensation-

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[113] Dustin Wahlstrom et al., *Neurobehavioral Evidence for Changes in Dopamine System Activity During Adolescence*, 34 NEUROSCIENCE BIOBEHAVIORAL REV. 631, 643 (2010).

[114] Monique Ernst et al., *Triadic Model of the Neurobiology of Motivated Behavior in Adolescence*, 36 PSYCHOL. MED. 299, 300-302 (2006).

seeking behavior. Scientific research has shed light on the biological mechanisms that help to explain this behavior. And each time this Court has examined the constitutional limitations of imposing severe penalties on juvenile offenders, the scientific research on the development of the adolescent brain has grown. This research establishes that "the brain systems that are crucial for exerting cognitive control over behavior and processing rewards are still immature during adolescence."[115] "These immaturities result in a system that is able to exert cognitive control, but in an inconsistent manner with limited flexibility and motivational control."[116] In other words, "the basic elements are established, but refinements are needed to support the necessary efficiency in circuit processing to establish reliable executive control."[117] As one researcher put it, the process of adolescent development is akin to "starting the engines without a skilled driver behind the wheel."[118]

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[115] *See* Luna, *supra* note 4, at 258; *see also* Ryan L. Muetzel et al., *The Development of Corpus Callosum Microstructure and Associations with Bimanual Task Performance in Healthy Adolescents*, 39:4 NEUROIMAGE 1918 (2008); Elizabeth A. Olson, *White Matter Integrity Predicts Delay Discounting Behavior in Adolescents: A Diffusion Tensor Imaging Study*, 21:7 J. COGNITIVE NEUROSCI. 1406 (2008); Elizabeth A. Olson, *Delay and Probability Discounting Behavior in Healthy Adolescents: Associations with Age, Personality Style, and Other Measures of Executive Function*, 43:7 PERSONALITY AND INDIVIDUAL DIFFERENCES 1886 (2007).

[116] *See* Luna, *supra* note 4, at 258.

[117] *Id.*

[118] Steinberg, *Adolescent Development*, *supra* note 9, at 56.

CONCLUSION

While not formally supporting either party in these cases, the *amici* hope that the Court will consider the scientific evidence presented here in its deliberations about whether, in the present case, the Eighth Amendment (1) requires that these defendants be held to a different standard of culpability from that which applies to adults and (2) prohibits the imposition of a sentence of life without the possibility of parole on an adolescent offender.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 17 2012
OFFICE OF THE CLERK

Nos. 10-9646 & 10-9647

In The
Supreme Court of the United States

EVAN MILLER, *Petitioner*,
v.
STATE OF ALABAMA, *Respondent*.

KUNTRELL JACKSON, *Petitioner*,
v.
RAY HOBBS, *Respondent*.

On Writs of Certiorari to the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas

BRIEF OF THE AMERICAN PROBATION AND PAROLE ASSOCIATION, THE CHILDREN'S DEFENSE FUND, THE CHILD WELFARE LEAGUE OF AMERICA, THE COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS, AND THE NATIONAL PARTNERSHIP FOR JUVENILE SERVICES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. JUVENILES' LACK OF MATURITY AND UNDERDEVELOPED SENSE OF RESPONSIBILITY DIMINISH THEIR CULPABILITY AND COMPETENCE 5

A. Juveniles Lack Maturity and Have an Underdeveloped Sense of Responsibility 5

B. Juveniles' Distinctive Characteristics Diminish Their Criminal Culpability 7

C. Juveniles' Distinctive Characteristics Are Severe Challenges for Their Own Legal Representation 10

D. The Lives of Scott Filippi and Roger Needham Illustrate Juveniles' Tragic Impulsiveness And The Possibility of Rehabilitation 12

II. JUVENILES ARE MORE SUSCEPTIBLE TO NEGATIVE INFLUENCES AND OUTSIDE PRESSURES THAN ADULTS 16

A. Research Shows Juveniles Are More Vulnerable and Susceptible to Negative Influences and Pressures 16

B. The Life of Lawrence Wu Illustrates Juveniles' Vulnerability to Negative Influences and Pressures 21

III. JUVENILES HAVE INCREASED LIKELIHOOD FOR REHABILITATION BECAUSE ADOLESCENT CHARACTER IS NOT WELL FORMED 24

A. Research Shows Juveniles Have Increased Likelihood for Rehabilitation 24

B. The Life of Brandon Carnell Illustrates Juveniles' Capacity for Rehabilitation 27

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Dusky v. United States,
362 U.S. 402 (1980) 10

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509 U.S. 389 (1993)..... 10

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130 S. Ct. 2011 (2010).....passim

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INTEREST OF *AMICI CURIAE*

The organizations submitting this brief work with, and on behalf of, juveniles in a variety of settings, including inside and outside the criminal justice system. Based on this experience, *amici* know that the differences between juveniles and adults – including impulsiveness, susceptibility to negative influences, and the capacity for rehabilitation – are profound. While juvenile offenders must be accountable for their actions, they cannot be held to the same standards of blameworthiness and culpability as adults.[1]

The American Probation and Parole Association ("APPA") is an international organization, representing approximately 35,000 probation and parole professionals in juvenile and adult corrections. The APPA works to develop a system of probation and parole services that provides public safety by ensuring humane, effective and individualized sentences for offenders, and support and protection for victims.

The Children's Defense Fund ("CDF") is a non-profit child advocacy organization dedicated to ensuring a level playing field for all children and to championing policies and programs that lift children out of poverty, protect them from abuse and neglect, and ensure their access to health care, quality education, and a moral and spiritual foundation.

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

CDF advocates nationwide on behalf of children to ensure that children are always a priority.

The Child Welfare League of America ("CWLA") is a coalition of hundreds of private and public agencies serving vulnerable children and families by advancing policies, best practices and collaborative strategies in support of every child growing up in a safe, loving, stable family. CWLA's focus is on children and youth who may have experienced abuse, neglect, family disruption, or a range of other factors that jeopardize their safety, permanence, or well-being.

The Council of Juvenile Correctional Administrators ("CJCA") represents the youth correctional CEOs in fifty states, Puerto Rico, Washington, D.C. and some major metropolitan counties. Through the collaborative efforts of its members, CJCA has developed expertise in designing and implementing the most effective practices for the treatment of juveniles within their care.

The National Partnership for Juvenile Services ("NPJS") was formed in 2001 and is comprised of four partner organizations: the National Association of Juvenile Correction Agencies, the National Juvenile Detention Association, the Juvenile Justice Trainers Association, and the Council of Educators for At-Risk and Delinquent Youth. NPJS provides professional development and technical assistance in the field of juvenile justice and delinquency prevention – promoting best-practices and standards – to positively affect youth, families and communities

SUMMARY OF ARGUMENT

In *Graham v. Florida*, 130 S. Ct. 2011 (2010), this Court held that sentencing juvenile offenders who did not commit homicide to life-without-parole ("LWOP") is disproportionate to the culpability of juvenile offenders and therefore constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In doing so, this Court affirmed the simple yet profound distinction that juveniles are different from adults. This insight remains fully applicable in the context of juvenile offenders who commit homicide. Juveniles – even those convicted of homicide – are different.

Amici agree with the legal arguments set forth in Petitioners' brief. For the benefit of this Court, and based on *amici*'s own experience, *amici* present empirical data supporting three important points. First, juveniles have lessened ability to understand the consequences of their conduct, diminishing their culpability and competence. Second, juveniles are vulnerable to outside influences and pressure, and ill equipped to control their immediate surroundings or escape negative influences. Third, far from being irretrievably depraved and lost to society, juveniles possess significant capacity for development and rehabilitation.

In addition, in each section, *amici* include facts about individual juveniles involved in homicide or attempted homicide illustrating these distinctive characteristics. With regard to each of these individuals, a system of life-without-parole for juveniles would have prevented the development of dedicated, committed, productive citizens, and foreclosed the possibility of genuine rehabilitation.

Juveniles who commit homicide are different from adults in the same fundamental ways that this Court has recognized in other contexts. As the Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, punishment must be proportionate to juvenile offenders' culpability. Accordingly, in light of the distinctive characteristics of juveniles, sentences of life without the possibility of parole for juveniles violate the prohibition on cruel and unusual punishment in the Eighth and Fourteenth Amendments.

ARGUMENT

The differences between adolescents and adults are stark. These differences, long recognized by this Court, are confirmed and detailed in an extensive body of research. First, juveniles' lack of maturity and development burdens them with an underdeveloped sense of responsibility – affecting both their own culpability and their ability to assist in their defense. Second, juveniles are vulnerable to negative influences and societal pressures; at the same time, while more vulnerable, juveniles cannot control their own environments or escape from these negative influences and pressures. Third, because juveniles are still maturing, their identities are not fully formed, and they have a remarkable capacity for change and rehabilitation.

I. JUVENILES' LACK OF MATURITY AND UNDERDEVELOPED SENSE OF RESPONSIBILITY DIMINISH THEIR CULPABILITY AND COMPETENCE

Juveniles lack maturity. This lack of maturity results in an underdeveloped sense of responsibility, affecting impulse control and predictive abilities.[2] These traits undermine juveniles' culpability for their criminal offenses and their ability to assist with issues related to their legal representation.

A. Juveniles Lack Maturity and Have an Underdeveloped Sense of Responsibility

Marked differences between adults and adolescents, including their capacities to exercise self-control and anticipate long-term impacts of their actions, prevent juveniles from effectively measuring the "cost-benefit analysis that attaches any weight to the possibility of" a LWOP sentence.[3] In fact,

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[2] *See* Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 Pharmacology, Biochemistry & Behav. 212, 216 (2009) (noting adolescence is commonly characterized as the developmental period between childhood and adulthood from ages twelve to seventeen); *see also* B.J. Casey, Sara Getz & Adriana Galvan, *The Adolescent Brain*, 28 Dev. Rev. 62, 72 (2008) (defining adolescence as a transitional time marked by puberty).

[3] *See Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality) (suggesting offenders under age 16 do not consider effect of juvenile death sentences); *see also* Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. Res. Adolescence 211, 215 (2011); Johanna Cooper Jennings, *Juvenile Justice, Sullivan, and Graham: How The Supreme Court's Decision Will Change The Neuroscience Debate*, 2010 Duke L. & Tech. Rev. 006, 7 (2010) (discussing youthful offenders, who often act impulsively without *(cont'd)*

characteristics such as risk-taking, sensation-seeking, and impulsiveness are common in adolescent behavior.[4] Behaviors that seem likely to increase positive emotions tend to become more desirable, even if they carry risk. [5] These characteristics come together in a lack of maturity that leaves juveniles unable to consider fully the future impact of their actions.[6]

Adolescents have difficulty planning ahead and anticipating future consequences.[7] Indeed, because of juveniles' "lack of maturity and an underdeveloped sense of responsibility," they are

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considering the long-term consequences, being denied opportunity for societal reentry when they are sentenced to life without parole).

[4] Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, 45 J. Adolescent Health 216, 218 (2009); *see also* Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts*, 14 J. Health Care L. & Pol'y 375, 382 (2011) (noting impulsivity and sensation seeking are psychosocial factors that can affect risk-taking); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Developmental Psychol. 1764, 1764 (2008).

[5] *See* Albert & Steinberg, 21 J. Res. Adolescence at 217.

[6] Elizabeth Locker, *Grow Up Georgia . . . It's Time to Treat Our Children as Children*, 4 J. Marshall L.J. 85, 96 (2011) (citing *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

[7] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 36-37 (2009).

susceptible to "impetuous and ill-considered actions and decisions."[8] Unable to understand the likely outcome of events arising from their actions, sentences of life without parole offer little to deter juveniles from their actions.[9]

B. Juveniles' Distinctive Characteristics Diminish Their Criminal Culpability

Juveniles' distinctive characteristics diminish their criminal culpability. Juveniles are predisposed to hasty, high-risk behavior often resulting in terrible consequences.[10] These characteristics leave juveniles "less responsible, more myopic, and less temperate than the average adult," shunning broader perspectives on their individual actions.[11] Juveniles are statistically overrepresented in nearly all calculations of risky behavior.[12] This overrepresentation includes serious crimes, with

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[8] *Johnson*, 509 U.S. at 367.

[9] *Thompson*, 487 U.S. at 836-38.

[10] *See* Locker, 4 J. Marshall L.J. at 95-96; *see also* Deanna Kuhn, *Do Cognitive Changes Accompany Developments in the Adolescent Brain?*, 1 Persp. on Psychol. Sci. 59 (2006) (exploring psychological implications of developments in adolescent brain).

[11] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 745, 757 (2000).

[12] Jeffrey Jensen Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 339 (1992), http://jeffreyarnett.com/articles/arnett1992recklessbehaviorinadolescence.pdf.

approximately thirty percent of American males committing a violent offense by the age of 18.[13]

For many, adolescence signals a period of harmful behavior that includes alcohol abuse, substance abuse, and reckless driving.[14] This behavior is accompanied by the adolescent belief in one's own invincibility – "the worst" being a result possible only for others.[15]

This type of juvenile anti-social behavior reaches its apex in the teenage years.[16] Juveniles' intellectual, social, and emotional maturity is "not as well-formed as that of an adult."[17] Recent research establishes that impulsiveness wanes steadily after

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[13] *See* U.S. Dep't of Health and Human Servs., Youth Violence: A Report of the Surgeon General (2001), http://www.surgeongeneral.gov/library/youthviolence/chapter2/sec12.html#prevelance.

[14] Valeria F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making: Implications for Theory, Practice, and Public Policy*, 7 Psychol. Sci. Pub. Int. 1, 8 (2006); *see also* Michael Windle & Rebecca C. Windle, *Alcohol and Other Substance Use and Abuse, in Blackwell Handbook of Adolescence* 450-463 (2003) (reporting empirical studies on initiation and escalation of adolescent substance use).

[15] Kathleen M. Thies & John F. Travers, *Handbook of Human Development for Healthcare Professionals* 195 (2006).

[16] *See* Jeffrey Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 No. 5 Am. Psychologist 469, 474-75 (2000), http://jeffreyarnett.com/articles/ARNETT_Emerging_Adulthood_theory.pdf.

[17] *Roper*, 543 U.S. at 570 (quoting *Thompson*, 487 U.S. at 835); *see also Graham*, 130 S. Ct. at 2026.

its apex, with appreciable decline into the mid-twenties.[18]

For juveniles, this lack of maturity, both in their behavior and their lack of foresight, can be exacerbated by circumstances requiring decisions "in the heat of passion, in the presence of peers, on the spur of the moment, in unfamiliar situations . . . [and] when behavioral inhibition is required for good outcomes."[19] Scientists have determined that adolescents, as a result of "hard wiring," experience an elevated impact of stress that creates a correspondingly intense drop in judgment during emotion or stressful events.[20] To the extent that juveniles are making decisions in emotionally charged or pressured situations, those decisions are affected by an inability to control risk-seeking impulses.[21] Even when cognizant of risks, juveniles discount them in favor of immediate perceived benefits and gratification.[22]

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[18] Laurence Steinberg, *A Dual Systems Model of Adolescent Risk-Taking*, 52 Developmental Psychobiology 216 (2010).

[19] Vivian E. Hamilton, *Immature Citizens and the State*, 2010 B.Y.U. L. Rev. 1055, 1110 (2010) (quoting Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 Dev. Psych. 625, 625 (2005)).

[20] Casey et al., 28 Dev. Rev. at 64.

[21] Hamilton, 2010 B.Y.U. L. Rev. at 1110.

[22] Reyna & Farley, 7 Psychol. Sci. Pub. Int. at 1.

C. Juveniles' Distinctive Characteristics Present Severe Challenges for Their Own Legal Representation

The distinctive characteristics of juveniles also present difficulties for defendants and counsel in the representation of juveniles. The same features that differentiate juveniles from adults – a lack of maturity, an unformed sense of responsibility, and impetuousness – also affect juveniles in criminal proceedings.[23]

To be tried in criminal court, individuals must have the capacity to understand the proceedings, comprehend their own legal rights, and consult with and assist their counsel in their own defense.[24] With juveniles, at least one-third of fifteen and sixteen-year-olds do not have an accurate understanding of a "right."[25] Adolescents have more difficulty grasping the roles of different actors in the adversarial system, undermining their understanding of their proceedings and their ability to assist counsel.[26] To make informed decisions in support of their defense, adolescent defendants must be able to understand how abstract concepts in criminal proceedings will

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[23] *Graham*, 130 S. Ct. at 2032; *see also* Tamar R. Birkhead, *Culture Clash: The Challenge of Lawyering Across Difference in Juvenile Court*, 62 Rutgers L. Rev. 959 (2010) (presenting challenges counsel face in representing juveniles).

[24] *Godinez v. Moran*, 509 U.S. 389 (1993); *Dusky v. United States*, 362 U.S. 402 (1980).

[25] Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary, in The Changing Borders of Juvenile Justice* 379 (2000).

[26] *Id.*

affect them individually.[27] Juveniles' distinctive inability to assist in their own defense can lead to wrongful convictions and subsequent sentencings.[28]

In 1979, this Court explained that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions."[29] As one juvenile sentenced to life-without-parole stated:

> "When I seen [my attorney] before the sentence it was in the bullpen behind the court room and he told me there that I'd be getting natural life, I asked him how long that was and he told me, I couldn't understand the whole thing and kept asking him when I'd be going home, but another inmate explained it all to me. . . . I didn't know anything about the law or that he was supposed to come and see me during trial."[30]

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[27] *Id.*

[28] Samuel Gross et al., *Exonerations in the United States 1989 through 2003*, Gideon Project, OSI 2004, http://www.mindfully.org/Reform/2004/Prison-Exonerations-Gross19apr04.htm (study discussing finding that cases involving juvenile defendants were over-represented among cases ultimately overturned as a wrongful conviction).

[29] *Parnham v. J.R.*, 442 U.S. 584, 603 (1979).

[30] Deborah Labelle et al., *Second Chances: Life Without Parole in Michigan Prisons*, ACLU of Michigan, at 16 (2004) [hereinafter "Labelle et al., *Second Chances*"]; *see also* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 828-31 (2005) (discussing how immaturity-based *(cont'd)*

In *Graham*, this Court emphasized the difficulty that defendants' youth causes in the attorney-client relationship.[31] Juvenile defendants are unable to assist their counsel as capably as adult defendants due to their suspicion and distrust of authority as well as their unfamiliarity with the criminal justice system.[32]

The defining characteristics of juveniles – such as impetuousness and an inability to grasp future consequences – thus affect not only a juvenile's commission of the crime, but also that juvenile's participation in the judicial system.

D. The Lives of Scott Filippi and Roger Needham Illustrate Juveniles' Tragic Impulsiveness and the Possibility of Rehabilitation

Scott Filippi and Roger Needham both committed homicide as minors in impulsive reactions to situational pressures. Both have been successfully rehabilitated, and their lives as productive adults would be impossible in an inflexible system of life-

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impairments can affect juvenile offenders' ability to understand their charges and the nature of the proceedings, as well as assist their attorneys).

[31] *Graham*, 130 S. Ct. at 2032.

[32] *Id.*; *see also* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 Notre Dame L. Rev. 245, 272-73 (2005) (minors work less effectively than adults with counsel due to developing cognitive skills, focus on immediate consequences, and lack of understanding of the attorney-client relationship).

without-parole for juvenile offenders who commit a homicide.

Scott Filippi – As a sixteen-year-old, Scott Filippi fatally shot his mother – a woman who had not only allowed, but participated in, the physical and psychological abuse of her children for years.[33] Court records describe the children's abuse as so severe that Filippi's sister lost her hearing and sight.[34] Filippi himself "remember[ed] a lot of dark rooms . . . a lot of hitting . . . and a lot of crying. No lights, just smack! and locked into a dark room."[35] He was left beaten by his stepfather "bloody from my head to my knees," followed by his mother's glancing instruction to "take a shower and get cleaned up."[36]

In October 1986, after years of being beaten with two-by-fours and belts, and being punched, kicked, and thrown down stairs, Filippi reacted in the heat of passion to his mother's abuse:

> "All of a sudden, she just started going off on me, telling me she hated me and she didn't love me. . . . Just going off. I ran upstairs, I grabbed a 22. One of Bruce's. . . . I just wanted her to

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[33] The Children's Court Centennial Communications Project, *Second Chances - 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice*, at 73-78, http://www.cjcj.org/files/secondchances.pdf.

[34] *Id.*

[35] *Id.* at 73.

[36] *Id.* at 74.

> listen, just to stop yelling at me and listen."[37]

Filippi shot and killed his mother.

Filippi was sentenced to a long-term residential treatment facility where he received psychological treatment.[38] Despite his horrific crime, involving the commission of a homicide as a minor, Filippi has succeeded in rehabilitating himself.

Following his release, Filippi joined the United States Army.[39] He flourished, and eventually earned a position in the Presidential Honor Guard of President George H.W. Bush.[40] Currently a sales director at a southern California Mercedes-Benz dealership, Filippi is engaged to be married and plans to write a book about his experiences to benefit others.[41]

Filippi explains:

> "I, and others like me, [am] living proof that prevention and rehabilitation programs are the best tools for deterring crime. I know that after reading this, people may view me differently. But when I was 16 and facing a life sentence in adult prison, I swore that if I could help others to get the same consideration I had, I would

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[37] *Id.* at 76.

[38] *Id.* at 77.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 78.

> do it. I am grateful for the chance I was given to make a new start, and hope other young offenders get the same chance."[42]

Roger Needham – Like Filippi, Roger Needham acted impulsively and committed homicide as a juvenile.

At the age of 15, Needham brought a gun to his high school.[43] Provoked by repeated name-calling, Needham killed one student and wounded another while being heard to say, "I'm tired of being pushed around. Now I'm even."[44]

Needham was released from a juvenile facility after years of rehabilitative programming and treatment.[45] Following his release, Needham went on to graduate from the University of Michigan with highest distinction and an eventual Ph.D. in mathematics.[46] He later secured employment teaching at St. Louis University and at the City University of New York.[47]

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[42] *Id.*

[43] Labelle et al., *Second Chances* at 23.

[44] Susan Taylor Martin, *Murder at Locker 02-069*, St. Petersburg Times Online (Feb. 11, 2001) http://www.sptimes.com/News/021101/Floridian/Murder_at_Locker_02_0.shtml.

[45] *Id.*

[46] *Id.*

[47] *Id.*

The events that led to the incarceration of Scott Filippi and Roger Needham were abhorrent. More generally, the violent acts committed by some juveniles are unquestionably brutal and deeply disturbing. At the same time, such acts are inextricably linked to juveniles' inability to exercise self-control and to anticipate the long-term impacts of their actions. These acts often are rooted in juveniles' propensity for risk-taking and impulsiveness. They reflect juveniles' distinctive susceptibility to impetuous and ill-considered actions and decisions. The lives of Scott Filippi and Roger Needham illustrate that even minors who commit the most egregious crimes – homicide – can be rehabilitated when they enter adulthood.

II. JUVENILES ARE MORE SUSCEPTIBLE TO NEGATIVE INFLUENCES AND OUTSIDE PRESSURES THAN ADULTS

A. Research Shows That Juveniles Are More Vulnerable and Susceptible to Negative Influences and Pressures

Juveniles face far greater vulnerability and susceptibility to negative influences and outside pressures than adults. [48] These influences and pressures include peers, substances, and environment. Scientists have identified

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[48] *See* Jeffrey Fagan, *The Contradictions of Juvenile Crime & Punishment*, J. of the Am. Acad. of Arts and Scis. at 44 (Summer 2010); *see also* Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1101 (2003) ("adolescents are less culpable than are adults because adolescent criminal conduct is driven by transitory influences").

psychological and neurological differences between children and adults that confirm the heightened vulnerability and susceptibility of minors.[49]

Adolescent vulnerability is well documented. First, adolescents exhibit less robust levels of independent functioning than adults, primarily manifested in weak self-reliance and self-concept.[50] These lower levels of independent functioning increase adolescent vulnerabilities to peer pressure and outside factors.[51]

Second, research indicates that adolescents are disposed to succumb to the negative influence of their peers.[52] Peer influence affects adolescent

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[49] *See, e.g.*, Cauffman & Steinberg, 18 Behav. Sci. & L. at 742-43; Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21(22) J. Neuroscience 8819, 8819 (2001); Steinberg & Scott, 58 Am. Psychologist at 1013; B.J. Casey et al., 28 Developmental Rev. at 62; B.J. Casey et al., *Structural and Functional Brain Development and Its Relation to Cognitive Development*, 54 Biological Psychol. 241 (2000); Eveline A. Crone et al., *Neurocognitive Development of Relational Reasoning*, 12 Developmental Sci. 55 (2009); Jay N. Giedd et al., *Anatomical Brain Magnetic Resonance Imaging Typically Developing Children and Adolescents*, 48 J. Am. Acad. Child & Adolescent Psychiatry 465 (2009); Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neuroscience 861 (1999).

[50] Kathleen Kemp et al., *Characteristics of Developmental Immaturity: A Cross-Disciplinary Survey of Psychologists* (under review).

[51] *See* Steinberg & Scott, 58 Am. Psychologist at 1012.

[52] *See* Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531 (2007) ("[T]here is little doubt that peers actually

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judgment both directly and indirectly.[53] Juveniles may make choices in response to direct peer pressure, with additional indirect pressure present in the desire for peer approval and related fear of rejection.[54] Importantly, "susceptibility to peer pressure" is greatest when anti-social behavior and delinquency are involved.[55] Adolescents thus have a tendency to choose an antisocial activity suggested by their peers rather than a more positive choice of their own.[56] Even with criminal activity, juveniles tend to commit crimes in groups far more than adults.[57] This phenomenon remains present even in the absence of direct pressure.[58]

This kind of pressure from the peer community can lead juveniles to join gangs and engage in violence. Data on juvenile delinquents are replete with references to gang peer groups and the

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influence each other and that the effects of peer influence are stronger during adolescence than in adulthood.").

[53] Steinberg & Scott, 58 Am. Psychologist at 1012.

[54] *Id.*

[55] *See* Steinberg & Monahan, 43 Developmental Psychol. at 1532.

[56] T. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 614 (1979).

[57] Peter Ash, *Adolescents in Adult Court: Does the Punishment Fit the Criminal?*, 34 J. Am. Acad. Psychiatry L. 145, 147 (2006).

[58] Gardner & Steinberg, 41 Developmental Psychol. at 629-30 (noting adolescents took twice as many risks on a driving task when peers were present than when they were alone, running yellow lights at the risk of being hit by an unseen car).

attendant expectations for criminal activity. In many cases, however, while this peer influence was a primary cause of crime and delinquency in minors, the gang influence did not remain a lasting presence in juveniles' post-adolescent lives.

Adolescents face particular vulnerability to drug abuse and addiction due to the developing state of their brains.[59] According to the U.S. Department of Education, drug abuse is a particular risk for juveniles because "[t]he critical areas in the brain used for making judgments and comprehending complex concepts like safety and freedom are not fully developed at age 15" and do not reach full development until individuals are in their twenties.[60] As a result, issues regarding drug abuse "occur during a period of dramatic changes" in the adolescent brain.[61]

At the same time, juveniles are more limited by their environments than adults, with little or no ability to decide where they live or attend school.[62] Many lack transportation, independent income, and

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[59] Don Vereen, *Research Shows Consequences of Drug Abuse on the Teenage Brain*, The Challenge Vol. 14, No. 3 (U.S. Dep't of Educ., Office of Safe and Drug Free Schools, 2007), http://thechallenge.org/14_3_research.html/.

[60] *Id.*

[61] *See Interview with Nora Valkow, M.D., Director of the National Institute on Drug Abuse (NIDA)*, The Challenge, Vol. 14, No. 3 (U.S. Dep't of Educ., Office of Safe and Drug-Free Schools, 2007), http://thechallenge.org/14_3_interview.html/.

[62] *See Roper*, 543 U.S. at 553; *see also* Locker, 4 J. Marshall L.J. at 99.

a route of exit.[63] As the Court explained in *Roper*, juveniles' "vulnerability and comparative lack of control over their immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."[64]

The greater the number of risk factors faced by children in their environments – including living in dilapidated and violent neighborhoods; attending failing and deteriorating schools; or suffering violence and neglect at home – the greater the risk that children will be deprived of healthy adolescent development and cognitive growth.[65] Poverty alone is an important factor in an adolescent's development that is "harmful to the physical, socioemotional, and cognitive well-being of children."[66] Evidence suggests that the damage to

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[63] *See id.*

[64] *Roper*, 543 U.S. at 570; *see also* Gary W. Evans, *The Environment of Childhood Poverty*, 59 Am. Psychologist 77, 88 (2004) (noting children from low-income environments and other risk factors, are "more likely to rely on peers than adults" and are particularly vulnerable to aggressive peers).

[65] *See* Evans, 59 Am. Psychologist at 88; Brian J. Bigelow, *There's an Elephant in the Room: The Impact of Early Poverty and Neglect on Intelligence and Common Learning Disorders in Children, Adolescents and Their Parents*, 23 Developmental Disabilities Bull. 177, 185 (2006); *see also* Arnold J. Sameroff et al., *Stability of Intelligence from Preschool to Adolescence: The Influence of Social and Family Risk Factors*, 64 Child Dev. 80, 80-97 (1993).

[66] Evans, 59 Am. Psychologist at 88; Bigelow, 23 Developmental Disabilities Bull. at 202 ("The deleterious effects of stressful levels of poverty on early child development are no longer subject to serious debate.").

brain growth and development from these toxic environmental factors begins at birth and "is often the most important variable in understanding children's learning disorders."[67]

B. The Life of Lawrence Wu Illustrates Juveniles' Vulnerability to Negative Influences and Pressures

Lawrence Wu was arrested for attempted murder as a juvenile as an outgrowth of the influence of his peers and environment. Wu emerged from this time in his life changed and ready to participate in, and contribute to, society. Sentences of life without the possibility of parole eliminate not only the hope that juveniles have for their futures, but also the contributions that juvenile offenders like Wu may some day make to their communities and society at large.

Lawrence Wu – Living in a single-parent home that Lawrence Wu describes as "lower middle class" and always "teetering on bankruptcy," Wu joined one of a half-dozen gangs at his high school.[68] According to Wu, doing so was considered a fast track to "coolness."[69] He explained: "They were universally feared by everyone, and I thought, this is wild and fun, and I started hanging out with these kids."[70]

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[67] Bigelow, 23 Developmental Disabilities Bull. at 177-78.

[68] *Second Chances - 100 Years of the Children's Court: Giving Kids a Chance to Make a Better Choice* at 14-18.

[69] *Id.* at 15.

[70] *Id.*

With continued delinquency and falling grades, Wu was kicked out of his house and dropped out of school.[71] He joined one of New York City's Asian gangs that ran gambling, prostitution, and enforcement syndicates from New York to Hong Kong.[72] As a 15-year-old gang member, Wu had been tasked with walking down the street in New York City or waiting in a movie theater armed with a gun and instructed to shoot any members of a rival Chinatown gang he encountered.[73] The rival gang targets of these "killing missions" never arrived where Wu was waiting.[74]

Wu eventually, however, was arrested as an accomplice in a brutal beating of an individual believed to be a rival gang member: "One of my friends had a lock, put his finger through the ring, and we walloped this guy with a 'fist of fury,' and basically bashed his head to a pulp."[75] Fortunately for Wu, this victim did not suffer long-term health consequences and the charges were dropped.[76]

Finally taking his cue that "this gangster stuff is getting old," Wu went from a juvenile record of arrest for attempted murder, fighting and other crimes relating to his involvement with Asian gangs, to completing his GED and college education.[77] Wu's

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[71] *Id.*

[72] *Id.* at 15-16.

[73] *Id.* at 16.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 17.

[77] *Id.*

successful transition from juvenile offender to contributing member of society culminated with his matriculation to law school and selection as editor-in-chief of the Columbia Law Review.[78] Wu now provides a powerful example of the effects external influences can have on a juvenile's actions. Today, as an adult, Wu counts his blessings:

> "I think it is definitely true that a system of second and third chances [is] very important. I know that from my own life. . . . I know a lot of people from that gang that I would want to see locked up. . . . They really are irredeemable. But it is hard to have a general rule of culpability when there are so many individual circumstances."[79]

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The vulnerability experienced by juveniles like Lawrence Wu, and his subsequent development into a valued, contributing member of society, refutes the notion that juveniles should be treated as society's worst offenders with no hope of rehabilitation.[80] Juveniles face greater vulnerability to negative influences and pressures than adults. The use of life-without-parole sentencing for juveniles is inconsistent with the fact that juveniles are different; it disregards the reality that juveniles' distinctive

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[78] *Id.* at 18.

[79] *Id.*

[80] *See Roper*, 543 U.S. at 570.

characteristics prevent their acts from being as "morally reprehensible as [those] of an adult."[81]

III. JUVENILES HAVE INCREASED LIKELIHOOD FOR REHABILITATION BECAUSE ADOLESCENT CHARACTER IS NOT WELL FORMED

A. Research Shows Juveniles Have Increased Likelihood for Rehabilitation

A sentence of life without the possibility of parole also removes opportunities for rehabilitation despite wide recognition that juveniles are candidates for rehabilitative success.[82] Despite misconceptions that violent juvenile offenders are irredeemable, juveniles have demonstrated capacity for rehabilitation. One researcher estimated that "chronic" juvenile offenders (*i.e.*, those with five or more arrests) account for merely six percent of the entire juvenile offender population. [83] More recently, a study followed more than 1,000 serious male adolescent offenders (*i.e.*, felony offenses with the exception of less serious property crimes, and misdemeanor weapons or sexual assault offenses) over the course of three years and revealed that only 8.7 percent of participants were found to be "persisters" such that

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[81] *Graham*, 130 S. Ct. at 2026 (quoting *Thompson*, 487 U.S. at 835).

[82] *See Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) ("it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life").

[83] Peter W. Greenwood, *Responding to Juvenile Crime: Lessons Learned*, 6 Future of Child. 75, 77 (1996).

their offending behavior was constant throughout the 36-month period.[84]

Juvenile corrections programs also have demonstrated success in establishing that juveniles can be rehabilitated.[85] For example, the Missouri Department of Youth Services ("MDYS") has reduced recidivism in juveniles through targeted programming, including regional small-scale secure correction centers and an arrangement of community-based non-residential programs and group homes.[86] In 2008, MDYS reported that their population included 13 percent of the youth committed for the most serious felonies and 41 percent for other felonies.[87] MDYS' recidivism rate

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[84] Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 Dev. & Psychol. 453, 462 (2010).

[85] *See* Counsel of Juvenile Correctional Administrators, Position Paper on Waiver and Transfer of Youths to Adult Systems (Oct. 2, 2009), http://cjca.net/cjcaresources/20/CJCA-Waiver-Position-Paper.pdf; *see also* Ronald D. Stephens & June Lane Arnette, *From the Courthouse to the Schoolhouse: Making Successful Transitions* at 4 (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, Feb. 2000), http://ncjrs.gov/pdffiles1/ojjdp/178900.pdf (finding participants in prison education programs are more likely to be employed and less likely to re-offend if and when released)

[86] Shelley Zavlek, *Planning Community-Based Facilities for Violent Juvenile Offenders as Part of a System of Graduated Sanctions*, Juv. Just. Bull. at 8 (Office of Juvenile Justice & Delinquency Prevention, Aug. 2005).

[87] Missouri Division of Youth Services, *Annual Report: Fiscal Year 2008* [hereinafter "MDYS Annual Report"], at vi (2009).

was ten percent for 2008 and had been between seven to nine percent for the four years prior to 2008.[88] Other examples of rehabilitative programs shown to be effective, even with violent and aggressive youth, include Functional Family Therapy (FFT), Multidimensional Therapeutic Foster Care (MTFC), and Multi-Systemic Therapy (MST).[89] All three have demonstrated significant results in reducing recidivism rates, even for serious violent offenders.[90]

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[88] *Id.* at 30 (recidivism rate based on the recommitment to MDYS after 24 months of release).

[89] *See* Greenwood, 6 Future of Child. at 75; *see also* Edward J. Loughran & Elizabeth Mengers, *CJCA Yearbook 2010: A National Perspective of Juvenile Corrections* (2010).

[90] *See* Charles M. Borduin et al., *Multisystemic Treatment of Serious Juvenile Offenders: Long-Term Prevention of Criminality and Violence*, 63 J. Consulting & Clinical Psychol. 569, 573 (1995) (describing the effectiveness of MST in reducing recidivism rates even for serious offenders with history of repeat felonies); Carol M. Schaeffer & Charles M. Borduin, *Long-term Follow-up to a Randomized Clinical Trial of Multisystemic Therapy with Serious and Violent Juvenile Offenders*, 73 U. Consulting & Clinical Psychol. 445, 449-452 (2005) (finding that the benefits of MST often extend into adulthood); W. Jeff Hinton et al., *Juvenile Justice: A System Divided*, 18 Crim. Just. Pol'y Rev. 466, 475 (2007) (describing FFT's success with drug-abusing youth, violent youth, and serious juvenile offenders); J. Mark Eddy et al., *The Prevention of Violent Behavior by Chronic and Serious Male Juvenile Offenders: A 2-Year Follow-up of a Randomized Clinical Trial*, 12 J. Emotional & Behav. Disorders 2, 2-7 (2004) (describing reduced recidivism rates for violent and chronically offending youth who participated in MTFC).

B. The Life of Brandon Carnell Illustrates Juveniles' Capacity for Rehabilitation

The success of rehabilitating even the most troubling of juvenile offenders is embodied in the life of Brandon Carnell. As a juvenile, Carnell shot and killed his family. As a rehabilitated adult, Carnell is an example of the potential that can exist in even the most troubled juvenile.[91]

Brandon Carnell – At the age of fourteen, Brandon Carnell murdered his parents and younger sister.[92] Originally claiming that his family had been shot by two men, Carnell later confessed to the killings.[93] He complained that he felt picked on by other family members and objected to his family's discipline and "negative attitude" toward him.[94]

Following his conviction, Carnell was incarcerated and given rehabilitative programming and treatment. He eventually was released at age 19.[95] Fourteen years later, Carnell directs several children's outreach programs and volunteers at his

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[91] *See generally Graham*, 130 S. Ct. at 2032 ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation."); *Roper*, 543 U.S. at 1195-96 ("it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed").

[92] *Killer at 14 is Model Citizen 15 Years Later*, Ann Arbor News, State Section, June 23, 2003, at B6; *see also Boy Charged in Murders Felt Picked on by Parents*, The Argus-Press, June 24, 1988, at 8.

[93] *Id.*

[94] *Id.*

[95] Labelle et al., *Second Chances*, at 23.

church.[96] He has completed his education, married, started his own family, and is now a valued member of his community.[97]

Juvenile life-without-parole rejects all possibility of rehabilitation. As Carnell's life story demonstrates, even one convicted of first degree murder as a juvenile and sentenced to a juvenile facility is not necessarily irrevocably destined to a life of violence and crime.[98] Like the death penalty, the practical effect of a life-without-parole sentence is to extinguish any possibility for juvenile offenders to "attain a mature understanding of [their] own humanity."[99]

As Brandon Carnell's life illustrates, juveniles have a unique capacity for rehabilitation.

CONCLUSION

Life without parole represents an irrevocable forfeiture of a juvenile offender's life – a permanent loss to society. As one court observed in overturning

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[96] *Id.*

[97] *Id.*

[98] *Id.*; *see also* Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 675 (1993).

[99] *See Roper*, 543 U.S. at 574; *see also Graham*, 130 S. Ct. at 2033 ("he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes"); *Hampton v. Kentucky*, 666 S.W.2d 737, 741 (Ky. 1984) (LWOP, "like death, is a sentence different in quality and character from a sentence to a term of years subject to parole").

a juvenile life-without-parole sentence, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days."[100]

The massive amount of research – as well as individual examples of juveniles involved in homicide or attempted homicide who undergo dramatic changes – illustrate that youthful mistakes, even the most grievous and deplorable, are not necessarily markers of character so permanently flawed that an irrevocable sentence to die in prison may be constitutionally imposed.[101]

As this Court decided in *Roper* and *Graham*, punishment must be proportionate to the culpability of a juvenile offender. With the understanding of the fundamental differences between juveniles and adults, inflexibly sentencing juveniles to life in prison with no possibility of parole for criminal offenses – including homicides – is cruel and unusual.[102]

For the foregoing reasons, *amici* respectfully submit that sentences of life without the possibility of parole for juveniles are in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

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[100] *Naovarath v. State*, 779 P.2d 944, 944 (1989).

[101] *See* Locker, 4 J. Marshall L.J. at 96.

[102] *See Graham*, 130 S. Ct. at 2033; *Roper*, 543 U.S. at 561.

Respectfully submitted,

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January 17, 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Nos. 10-9646, 10-9647

FILED
JAN 17 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EVAN MILLER,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

KUNTRELL JACKSON,
Petitioner,

v.

RAY HOBBS,
Respondent.

ON WRITS OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS AND THE ARKANSAS SUPREME COURT

BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, AMERICAN PSYCHIATRIC ASSOCIATION, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY 6

A. Juveniles Are Less Capable Of Mature Judgment Than Adults 7

B. Juveniles Are More Vulnerable To Negative External Influences 15

C. Juveniles Have A Greater Capacity For Change And Reform 19

D. Juveniles' Psychosocial Immaturity Is Consistent With Recent Research Regarding Adolescent Brain Development 25

II. SENTENCING JUVENILES TO LIFELONG IMPRISONMENT WITH NO OPPORTUNITY TO DEMONSTRATE REFORM IS A DISPROPORTIONATE PUNISHMENT 31

CONCLUSION 36

TABLE OF AUTHORITIES

CASES

Page(s)

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INTEREST OF AMICI CURIAE[1]

The American Psychological Association is a voluntary nonprofit scientific and professional organization with more than 150,000 members and affiliates. Since 1892, the Association has been the principal organization of psychologists in the United States. Its membership includes the vast majority of U.S. psychologists holding doctoral degrees from accredited universities.[2]

An integral part of the Association's mission is to increase and disseminate knowledge regarding human behavior and to advance psychology as a science, profession, and means of promoting health, education, and human welfare. Based on the well-developed body of research distinguishing the developmental characteristics of juveniles from those of adults, the Association has endorsed the policy reflected in the United Nations Convention on the Rights of the Child, which rejects life imprisonment without possibility of parole for offenses committed by individuals under 18 years of age.

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters of consent are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Amici acknowledge the assistance of Elizabeth Cauffman, Ph.D., Thomas Grisso, Ph.D., Terrie Moffitt, Ph.D., Laurence Steinberg, Ph.D., and Jennifer Woolard, Ph.D., in the preparation of this brief.

Research cited in this brief includes data from studies conducted using the scientific method. Such research typically is subject to critical review by outside experts, usually during the peer-review process preceding publication in a scholarly journal.

The American Psychiatric Association, with roughly 35,000 members, is the principal association of physicians who specialize in psychiatry. It has an interest in this Court's understanding of the lessons of scientific study and professional experience as the Court applies constitutional principles to individuals who often are patients of the organization's members.

The National Association of Social Workers (NASW) is the largest association of professional social workers in the world, with nearly 145,000 members and 56 chapters throughout the United States and abroad. NASW conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on relevant issues of importance. NASW opposes any legislation or prosecutorial discretion permitting children to be charged and punished under adult standards.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Graham* v. *Florida*, 130 S. Ct. 2011 (2010), this Court held that the Eighth Amendment prohibited life sentences without the possibility of parole for juveniles convicted of non-homicide offenses. The special characteristics of juveniles that this Court identified in *Graham*—and that are supported by a large and growing body of research—apply equally to juveniles convicted of homicide offences.

In *Graham*, this Court reiterated the critical differences between juveniles and adults that it set out in *Roper* v. *Simmons*, 543 U.S. 551 (2005)—differences that do not absolve juveniles of responsibility for their crimes, but that do reduce their culpability and undermine any justification for definitively ending their free lives. The Court noted that juveniles lack adults' ca-

pacity for mature judgment; that they are more vulnerable to negative external influences; and that their characters are not yet fully formed. *Graham*, 130 S. Ct. at 2026-2027; *Roper*, 543 U.S. at 569-570, 573. "The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper*, 543 U.S. at 570. Juveniles' vulnerability and lack of control over their surroundings "mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their ... environment." *Id.* And "[j]uveniles are more capable of change than are adults," meaning that "their actions are less likely to be evidence of 'irretrievably depraved character,'" even in the case of very serious crimes. *Graham*, 130 S. Ct. at 2026-2027; *see Roper*, 543 U.S. at 570. Accordingly, "[t]he juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential"—with "no chance to leave prison before life's end"—because "[m]aturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation." *Graham*, 130 S. Ct. at 2032.

As was true in *Graham*, "[n]o recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles." 130 S. Ct. at 2026. Rather, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.* In fact, an ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions. Compared to adults, juveniles are less able to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and avoiding unduly risky behaviors; and less

oriented to the future and thus less attentive to the consequences of their often-impulsive actions. Research also continues to demonstrate that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," while at the same time they lack the freedom and autonomy that adults possess to escape such pressures. *Roper*, 543 U.S. at 569. Thus, even after their general cognitive abilities approximate those of adults, juveniles are less capable than adults of mature judgment and decision-making, especially in the social contexts in which criminal behavior is most likely to arise.

Moreover, because juveniles are still in the process of forming coherent identities, adolescent crime often reflects the "signature"—and transient—"qualities of youth" itself, *Roper*, 543 U.S. at 570, rather than an entrenched bad character. Research into adolescent development continues to confirm the law's intuition that "'incorrigibility is inconsistent with youth.'" *Graham*, 130 S. Ct. at 2029. And although some youthful offenders will develop into criminal adults, it remains essentially impossible "even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. As *Roper* recognized, that is true even of juvenile offenders who have committed the most serious crimes.

Recent neuroscience research suggests a possible physiological basis for these recognized developmental characteristics of adolescence. It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance. That anatomical and functional immaturity is con-

sonant with juveniles' demonstrated psychosocial (that is, social and emotional) immaturity. During puberty, juveniles evince a rapid increase in reward- and sensation-seeking behavior that declines progressively throughout late adolescence and young adulthood. This effect is amplified by exposure to peers, and it corresponds with significant changes in certain elements of the brain's "incentive processing system"—especially the parts that process rewards and social cues. By contrast, the ability to resist emotional impulses and regulate behavior develops gradually throughout adolescence, and that behavioral development corresponds with gradual development of the brain structures and systems most involved in executive function and impulse control. The disjunction between these developmental processes—which is greatest in early and middle adolescence and narrows as individuals mature into young adulthood—is consistent with the familiar features of adolescence that this Court recognized in *Roper* and *Graham*.

In short, research continues to confirm and expand upon the fundamental insight underlying this Court's previous decisions: Juveniles' profound differences from adults undermine the possible penological justifications for punishing a juvenile offender with a sentence that "guarantees he will die in prison without any meaningful opportunity to obtain release." *Graham*, 130 S. Ct. at 2033. Nor does the scientific literature provide any reason to distinguish between homicide and non-homicide convictions in this regard. In either case, the signature qualities of adolescence reduce juveniles' culpability and increase their capacity for change. Condemning an immature, vulnerable, and not-yet-fully-formed adolescent to live every remaining day of his life in prison—whatever his crime—is thus a constitutionally disproportionate punishment.

ARGUMENT

I. RESEARCH IN DEVELOPMENTAL PSYCHOLOGY AND NEUROSCIENCE DOCUMENTS JUVENILES' GREATER IMMATURITY, VULNERABILITY, AND CHANGEABILITY

In *Roper* and *Graham*, this Court concluded that "marked and well understood" developmental differences between juveniles and adults both diminish juveniles' blameworthiness for their criminal acts and enhance their prospects of change and reform.[3] *Roper*, 543 U.S. at 572. Current research continues to reinforce that conclusion, confirming that the three developmental characteristics of juveniles that this Court has identified—their immaturity, their vulnerability, and their changeability—render them, as a group, very different from adults. As this Court has recognized, those differences are central to the calculus of culpability and the proportionality of punishments imposed on juvenile offenders.

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[3] We use the terms "juvenile" and "adolescent" interchangeably to refer to individuals aged 12 to 17. Science cannot, of course, draw bright lines precisely demarcating the boundaries between childhood, adolescence, and adulthood; the "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574. Likewise, younger adolescents differ in some respects from 16- and 17-year-olds. Nonetheless, because adolescents generally share certain developmental characteristics that mitigate their culpability, and because "the age of 18 is the point where society draws the line for many purposes between childhood and adulthood," this Court's decisions have recognized age 18 as a relevant demarcation point. *Graham*, 130 S. Ct. at 2030; *see Roper*, 543 U.S. at 574. The research discussed in this brief accordingly applies to adolescents under age 18, including older adolescents, unless otherwise noted.

A. Juveniles Are Less Capable Of Mature Judgment Than Adults

As this Court has recognized, adolescents have less capacity for mature judgment than adults, and as a result are more likely to engage in risky behaviors. "[A]s any parent knows and as ... scientific and sociological studies ... tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569.

As this Court noted in *Roper*, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" 543 U.S. at 569. Indeed, such behavior is "virtually a normative characteristic of adolescent development."[4] Juveniles' risky behavior frequently includes criminal activity; in fact, "numerous rigorous self-report studies have ... documented that it is statistically aberrant to refrain from crime during adolescence."[5] Both violent crimes and less serious offenses "peak sharply" in adolescence and "drop precipi-

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[4] Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 344 (1992).

[5] Terrie Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 685-686 (1993). Moffitt posits that there are two groups of adolescent offenders who may engage in similar antisocial behavior: a majority whose offending is limited to adolescence, and a minority who will persist into adulthood.

tously in young adulthood."[6] This "age-crime curve" is "[o]ne of the most consistent findings across studies."[7]

Adolescents' striking tendency to engage in risky and even illegal behavior stems in part from their lesser capacity for mature judgment. Research has shown that adolescents' judgment and decision-making differ from adults' in several respects: Adolescents are less able to control their impulses; they weigh the risks and rewards of possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions. Even older adolescents who have developed general cognitive capacities similar to those of adults show deficits in these aspects of social and emotional maturity.[8]

1. Empirical research confirms that adolescents are less capable of self-regulation than adults and, accordingly, are less able to resist their social and emotional impulses. For example, one study of maturity of judgment found that adolescents, including 17-year-olds, scored significantly lower than adults on measures of "temperance," which included "impulse control" and

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[6] *Id.* at 675 & fig. 1 (depicting age-crime curve with steep peak in late adolescence); Arnett, *supra* note 4, at 343; Terrie Moffitt, *Natural Histories of Delinquency*, in *Cross-National Longitudinal Research on Human Development and Criminal Behavior* 3, 29 (Elmar Weitekamp & Hans-Jürgen Kerner eds., 1994).

[7] Rolf Loeber et al., *Violence and Serious Theft* 77 (2008); *see also* Moffitt, *supra* note 6, at 7; Kathryn Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 Developmental Psychol. 1654, 1654 (2009).

[8] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55-56 (2008).

"suppression of aggression."[9] More recent studies confirm this result. In one example, researchers examined differences in impulsivity between ages 10 and 30, using both self-report and performance measures, and concluded that impulsivity declined throughout the relevant period, with "gains in impulse control occur[ring] throughout adolescence" and into young adulthood.[10] In short, "adults tend to make more adaptive decisions than adolescents," in part because "they have a more mature capacity to resist the pull of social and emotional influences and remain focused on long-term goals."[11]

As explained below, *infra* pp. 25-31, researchers have an increasingly well-developed understanding of aspects of the adolescent brain that may help explain this relative deficit in mature self-control. It is now well-established that the brain continues to develop throughout adolescence and young adulthood in precisely the areas and systems that are regarded as most

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[9] Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence*, 18 Behav. Sci. & L. 741, 748-749, 754 & tbl. 4 (2000).

[10] Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report*, 44 Developmental Psychol. 1764, 1774-1776 (2008).

[11] Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. Research on Adolescence 211, 220 (2011); *see also* Adriana Galvan et al., *Risk Taking and the Adolescent Brain*, 10 Developmental Sci. F8, F13 (2007) (finding, in study of individuals aged 7 to 29, that impulse control continues to develop throughout adolescence and early adulthood); Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual Differences 681, 684-686 (2007) (reporting significant decline in impulsivity from ages 14-16 to 20-22).

involved in impulse control, planning, and self-regulation. But juveniles also lack experience navigating the changing social and environmental contexts, and regulating the new emotional pressures, of adolescence. *See Roper*, 543 U.S. at 569. "[T]he developing adolescent can only learn his or her way to fully developed control by experience," and that "process will probably not be completed until very late in the teen years."[12] Thus, "expecting the experience-based ability to resist impulses ... to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking."[13]

2. Adolescents not only struggle to regulate their behavior in response to their emotional impulses, but also respond differently to perceptions of risk and reward. "In general, adolescents use a risk-reward calculus that places relatively less weight on risk, in relation to reward, than that used by adults."[14] For example, one study comparing adolescent and adult decision-making found that, when asked to evaluate hypothetical decisions, adolescents as old as 17 were less likely

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[12] Franklin Zimring, *Penal Proportionality for the Young Offender*, in *Youth on Trial* 271, 280 (Thomas Grisso & Robert Schwartz eds., 2000).

[13] *Id.* at 282.

[14] Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1012 (2003); *see* Arnett, *supra* note 4, at 350-353 (summarizing evidence that adolescent recklessness relates to poor "probability reasoning"); Susan Millstein & Bonnie Halpern-Felsher, *Perceptions of Risk and Vulnerability*, in *Adolescent Risk and Vulnerability* 15, 34-35 (Baruch Fischoff et al. eds., 2001).

than adults to mention possible long-term consequences, to evaluate both risks and benefits, and to examine possible alternative options.[15] Similarly, a recent study that employed a gambling task to measure reward-seeking and risk-avoidance behavior in a group of more than 900 individuals aged 10 to 30 found that "adolescents and adults evince[d] significantly different patterns of approach [*i.e.*, reward-seeking] and avoidance [*i.e.*, risk-averse] behavior."[16] Whereas adolescents improved their performance over time by being drawn to the bets with the best rewards, adults improved by avoiding bets with the worst losses. The authors concluded that the "present study, as well as previous work, demonstrates that decision making ... improves throughout adolescence and into young adulthood but that this improvement may be due not to cognitive maturation but to changes in affective processing. Whereas adolescents may attend more to the potential rewards of a risky decision than to the potential costs, adults tend to consider both, even weighing costs more than rewards."[17]

Similarly, adolescents are particularly attuned to *immediate* rewards, and display much steeper "tempo-

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[15] Bonnie Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Developmental Psychol. 257, 265, 268 (2001). Even greater differences prevailed between adults and younger adolescents. *See id. at* 268.

[16] Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 Developmental Psychol. 193, 204 (2010).

[17] *Id.* at 204, 206.

ral discounting" than adults.[18] Juveniles are emotionally primed for spur-of-the-moment, reward- and sensation-seeking behavior without offsetting, adult sensitivities to corresponding risks and longer-term consequences. Indeed, studies have shown that perceptions of reward, not risk, are better predictors of adolescent antisocial behaviors.[19] This less mature weighing of risk and reward renders adolescents more likely to engage in criminal activity, as well as other kinds of risk-taking.[20]

3. Finally, juveniles differ from adults in their ability to foresee and take into account the consequences of their behavior. By definition, adolescents have less life experience on which to draw, making it less likely that they will fully apprehend the potential negative consequences of their actions.[21] Moreover, adolescents are less able than adults to envision and plan for the future, a capacity still developing during adolescence.[22] The study of maturity of judgment discussed above found

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[18] Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 39 (2009); Steinberg, *supra* note 8, at 58.

[19] Louk Peters et al., *A Review of Similarities Between Domain-Specific Determinants of Four Health Behaviors Among Adolescents*, 24 Health Educ. Research 198, 216 (2009).

[20] Arnett, *supra* note 4, at 344, 350-351 (relating skewed adolescent risk- and reward-perception to fact that 50% or more of adolescents report drunk driving, unprotected sex, illegal drug use, or some form of criminal activity).

[21] *Id.* at 351-352; Zimring, *supra* note 12, at 280.

[22] *See* Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Developmental Rev. 1, 28-29 (1991); Steinberg et al., *supra* note 18, at 35-36.

that adolescents' future orientation is weaker than adults': Comparing over 1,000 subjects, it found that even 17-year-olds scored lower than adults on measures of "perspective," which encompassed "the ability to see short and long term consequences," as well as the ability to "take other people's perspectives into account."[23] Similarly, studies have shown that, among 15- to 17-year-olds, realism in thinking about the future increases with age, and that the skills required for future planning continue to develop until the early 20s.[24]

The ability to resist and control emotional impulses, to gauge risks and benefits in an adult manner, and to envision the future consequences of one's actions—even in the face of environmental or peer pressures—are critical components of social and emotional maturity, necessary in order to make mature, fully considered decisions. Empirical research confirms that even older adolescents have not fully developed these abilities and hence lack an adult's capacity for mature judgment. "[I]t is clear that important progress in the development of [social and emotional maturity] occurs sometime during late adolescence, and that these changes have a profound effect on the ability to make consistently mature decisions."[25]

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[23] Cauffman & Steinberg, *supra* note 9, at 746, 748, 754 & tbl. 4.

[24] Nurmi, *supra* note 22, at 28-29; *see* Steinberg et al., *supra* note 18, at 35-36.

[25] Cauffman & Steinberg, *supra* note 9, at 741, 756, 758 (noting that the most dramatic increase in psychosocial maturity occurs between ages 16 and 19); *see* Halpern-Felsher & Cauffman, *supra* note 15, at 271 ("[I]mportant progress in the development of decision-making competence occurs sometime during late adolescence[.]").

It should be noted that multiple abilities contribute to mature judgment, and those abilities develop at different rates. Sound judgment requires both cognitive and psychosocial skills, but the former mature earlier than the latter. Studies of general cognitive capability show an increase from pre-adolescence until about age 16, when gains begin to plateau.[26] By contrast, social and emotional maturity continue to develop throughout adolescence. Thus, older adolescents (aged 16-17) often have logical reasoning skills that approximate those of adults, but nonetheless lack the adult capacities to exercise self-restraint, to weigh risk and reward appropriately, and to envision the future that are just as critical to mature judgment,[27] especially in emotionally charged settings.[28] Younger adolescents are thus doubly disadvantaged, because they typically lack not only those social and emotional skills but basic cognitive capabilities as well.[29]

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[26] *See, e.g.*, Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 343-344 (2003) (16- to 17-year-olds did not differ from 18- to 24-year-old adults but performed significantly better than 14- to 15-year-olds on test of basic cognitive abilities); Daniel Keating, *Cognitive and Brain Development*, in *Handbook of Adolescent Psychology* 45, 64 (Richard Lerner & Laurence Steinberg eds., 2d ed. 2004) (cognitive functions exhibit robust growth at earlier ages but approach a limit in the 14- to 16-year-old group).

[27] Cauffman & Steinberg, *supra* note 9, at 743-745; Halpern-Felsher & Cauffman, *supra* note 15, at 264-271; Steinberg, *supra* note 8, at 55-59.

[28] Albert & Steinberg, *supra* note 11, at 216-220.

[29] The dissent in *Roper* criticized the American Psychological Association for taking allegedly inconsistent positions regarding adolescent maturity with respect to severe criminal sanctions for

B. Juveniles Are More Vulnerable To Negative External Influences

As this Court has also recognized, "juveniles are more vulnerable ... to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569. Because of their developmental immaturity, adolescents are more susceptible than adults to the negative influences of their environment, and their actions are shaped directly by family and peers in ways that adults' are not. "Adolescents are dependent on living circumstances of their parents and families and hence are vulnerable to the impact of conditions well beyond their control."[30] Difficult family and neighborhood conditions are major risk factors for juvenile crime, includ-

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juveniles (in *Roper*) and the competence of minor females to obtain abortions absent parental notification (in *Hodgson* v. *Minnesota*, 497 U.S. 417 (1990)). *See* 543 U.S. at 617-618 (Scalia, J., dissenting). These are different questions concerning distinct aspects of mature judgment. *Hodgson* addressed *competence* to make medical decisions that can be made in a relatively unhurried manner in consultation with medical professionals, and the Association's brief thus focused on adolescents' *cognitive* abilities, which approximate those of adults by mid-adolescence. The questions presented in *Roper*, *Graham*, and this case concern the degree of *culpability* and *reformability* of adolescents who commit criminal acts that often evince impulsivity and ill-considered choices resulting from *psychosocial* immaturity. *See* Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 Am. Psychologist 583, 592-593 (2009); Elizabeth Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 Law & Hum. Behav. 221, 226-235 (1995).

[30] Alan Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in *Youth on Trial*, *supra* note 12, at 47.

ing homicide.[31] Yet, precisely because of their legal minority, juveniles lack the freedom to remove themselves from those negative external influences. Put simply, juveniles lack the control over themselves and their lives that adults possess, mitigating their blameworthiness for remaining in destructive or "'criminogenic'" situations. *Roper*, 543 U.S. at 569.

Juveniles are also especially vulnerable to the negative influence of peer pressure. Research has shown that susceptibility to peer pressure to engage in antisocial behavior increases between childhood and early adolescence, peaks at around age 14, and then declines slowly during the late adolescent years, with relatively little change after age 18.[32] For instance, one major study found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among

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[31] *Id.* at 47-48; *see* Rolf Loeber & David Farrington, *Young Homicide Offenders and Victims: Risk Factors, Prediction, and Prevention from Childhood* 61 & tbl. 4.1 (2011) (noting high likelihood that homicide offenders came from broken family or bad neighborhood); Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Events*, in *Youth on Trial*, *supra* note 12, at 372, 389-391.

[32] Elizabeth Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008); Thomas Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 612, 615-616 (1979); Laurence Steinberg & Susan Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 848 (1986); Fagan, *supra* note 31, at 382-384 (discussing coercive effect of social context on adolescents).

young adults.[33] "[T]he presence of peers makes adolescents and youth, but not adults, more likely to take risks and more likely to make risky decisions."[34]

This study was recently replicated using fMRI technology, allowing researchers to measure variations in the activation of different brain areas under different experimental conditions. Because of technological constraints, the "peer pressure" variable was limited to manipulating whether test subjects were observed by peers or not while performing the task. Strikingly, mere awareness that peers were watching encouraged risky behavior among juveniles, but not adults.[35] The neuroimaging also showed different activation in different brain areas across the experimental variables. Adults showed significantly greater activation in brain regions involved in executive functions and the regulation of impulses, whether or not they were being observed by peers. By contrast, adolescents showed significantly greater activation in brain areas associated with reward processing when they were told that their peers were watching than when they were not being observed.[36]

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[33] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood*, 41 Developmental Psychol. 625, 626-634 (2006).

[34] *Id.* at 634; *see* Laurence Steinberg & Kathryn Monahan, *Age Differences in Resistance to Peer Influence*, 43 Developmental Psychol. 1531, 1538 (2007) (same).

[35] Jason Chein et al., *Peers Increase Adolescent Risk Taking By Enhancing Activity in the Brain's Reward Circuitry*, 14 Developmental Sci. F1, F7 (2011).

[36] *Id.* at F5-F8.

Juveniles' lesser ability to resist peer influence affects their judgment both directly and indirectly. "In some contexts, adolescents might make choices in response to direct peer pressure, as when they are coerced to take risks that they might otherwise avoid. More indirectly, adolescents' desire for peer approval, and consequent fear of rejection, affect their choices even without direct coercion. The increased salience of peers in adolescence likely makes approval-seeking especially important in group situations."[37]

Adolescents are thus more likely than adults to engage in antisocial behavior in order to conform to peer expectations or achieve respect and status among their peers.[38] Not surprisingly, juvenile crime is significantly correlated with exposure to delinquent peers,[39] and adolescents are "far more likely than adults to commit crimes in groups."[40] "No matter the crime, if a teenager is the offender, he is usually not committing the offense alone."[41] Indeed, "[m]ost adolescent decisions to break the law take place on a social stage where the immediate pressure of peers is the real motive."[42] "A

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[37] Scott & Steinberg, *supra* note 32, at 38-39; *see also* Moffitt, *supra* note 5, at 686; Zimring, *supra* note 12, at 280-281.

[38] *See* Moffitt, *supra* note 5, at 686.

[39] *See id.* at 687-688.

[40] Scott & Steinberg, *supra* note 32, at 39.

[41] Zimring, *supra* note 12, at 281; *see* Joan McCord & Kevin Conway, *Co-Offending and Patterns of Juvenile Crime* 5 (2005) (finding that "[c]o-offending violence increased throughout adolescence").

[42] Zimring, *supra* note 12, at 280.

necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer-pressure," a social skill that is not fully developed in adolescents.[43]

In short, as this Court has observed, "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings* v. *Oklahoma*, 455 U.S. 104, 115 (1982). Because juveniles' developmental immaturity and legal minority render them both more susceptible to, and less capable of escaping, negative external pressures, they "have a greater claim than adults to be forgiven" for the criminal acts that result from such pressures. *Roper*, 543 U.S. at 570.

C. Juveniles Have A Greater Capacity For Change And Reform

Finally, as this Court has recognized, "the character of a juvenile is not as well formed as that of an adult," and "[t]he personality traits of juveniles are more transitory, less fixed." *Roper*, 543 U.S. at 570. Accordingly, "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character.'" *Graham*, 130 S. Ct. at 2026. A defining aspect of adolescence is that character is not yet fully formed, and adolescents' signature qualities—including their susceptibility to peer influence and weaknesses in self-regulation—reflect their incomplete identity or "sense of self." Thus, what may be perceived as fixed personality traits in juveniles may in fact result from malleable factors such as present maturity level or social

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[43] *Id.* at 280-281.

context, rather than engrained or enduring aspects of personality or worldview. Research has shown that personality traits change significantly during the developmental transition from adolescence to adulthood,[44] and the process of identity-formation typically remains incomplete until at least the early twenties.[45] Juveniles are simply more likely than adults to change.

This Court recognized in *Roper* that because "juveniles still struggle to define their identity, ... it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." 543 U.S. at 570. And it reaffirmed in *Graham* that "'from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.'" 130 S. Ct. at 2026-2027.

In fact, juveniles do typically outgrow their antisocial behavior as the "'impetuousness and recklessness'" of youth subside in adulthood. *Roper*, 543 U.S. at 570. Adolescent criminal conduct frequently results from

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[44] *See* Brent Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course*, 132 Psychol. Bull. 1, 14-15 (2006).

[45] *E.g.*, Alan Waterman, *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341, 355 (1982) ("The most extensive advances in identity formation occur during the time spent in college."); Laurence Steinberg & Robert Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial*, *supra* note 12, at 9, 27 ("[M]ost identity development takes place during the late teens and early twenties."); Scott & Steinberg, *supra* note 32, at 52 ("[C]oherent integration of ... [identity] does not occur until late adolescence or early adulthood. ... [T]he final stages of this process often occur during the college years.").

experimentation with risky behavior and not from deep-seated moral deficiency reflective of "bad" character.[46] For most juveniles, therefore, antisocial behavior will "'cease with maturity as individual identity becomes settled.'" *Id.* at 570. Only a small proportion of adolescents who experiment with illegal activities will develop an entrenched pattern of criminal behavior that persists into adulthood; "the vast majority of adolescents who engage in criminal or delinquent behavior desist from crime as they mature."[47]

As this Court has previously observed, moreover, even experts have no reliable way to predict whether a particular juvenile offender will continue to commit crimes as an adult. *See Roper*, 543 U.S. at 573. The positive predictive power of juvenile psychopathy assessments, for instance, remains poor. One study found that only 16% of young adolescents who scored in the top quintile on a juvenile psychopathy measure would eventually be assessed as psychopathic at age 24.[48] The authors concluded that "most individuals identified as psychopaths at age 13 will not receive such a diagnosis" as adults.[49] A recent study of 75 male juvenile offenders found that assessments of psychopathic characteris-

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[46] Moffitt, *supra* note 5, at 686, 690; *see also* Arnett, *supra* note 4, at 344, 366-367.

[47] Steinberg & Scott, *supra* note 14, at 1014-1015; *see also* Moffitt, *supra* note 5, at 685-686; Monahan et al., *supra* note 7, at 1654, 1655.

[48] Donald Lynam et al., *Longitudinal Evidence That Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. Abnormal Psychol. 155, 160 (2007).

[49] *Id.* at 162.

tics did not predict general or violent reconvictions over a 10-year follow-up period.[50] And another recent study showed no correlation between a youthful homicide offense and the basic psychological measures of persistent antisocial personality such as "cruelty to people and callous-unemotional behavior."[51]

To be sure, research has identified certain childhood risk factors, or "predictors," that show a statistically significant association with adult criminality. But such studies do not suggest that anyone could reliably determine, *ex ante*, whether particular juvenile offenders will reoffend. To the contrary, the same research makes clear that such predictions cannot be made with any accuracy. Simply put, while many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults. For example, a major longitudinal study of Pittsburgh inner-city boys successfully identified, *ex post*, childhood risk factors, including various forms of antisocial behavior and crime, that were correlated with future homicide convictions. But it also found that, even among the subgroup of boys with the greatest number of risk factors, only a small minority were eventually convicted of homicide: Using the authors' model to attempt to identify juveniles who would be future homicide offenders yielded a very high false positive rate of 87%.[52]

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[50] *See* John Edens & Melissa Cahill, *Psychopathy in Adolescence and Criminal Recidivism in Young Adulthood*, 14 Assessment 57, 60 (2007).

[51] Loeber & Farrington, *supra* note 31, at 158.

[52] *Id.* at 75.

In fact, researchers have consistently concluded that the behavior of juveniles who will and will not continue as criminal offenders through adulthood is "often indistinguishable during adolescence."[53] In first distinguishing between adolescence-limited and persistent offenders, researchers recognized that they could not "effectively assign individual delinquent adolescents to meaningful subtypes on the basis of ... their antisocial behavior during adolescence."[54] And those who have dedicated their careers to identifying risk factors associated with persistent criminality continue to acknowledge that "[t]he results show very imperfect predictions of which offense trajectory individuals will follow over time," and to warn against the "danger that policy makers will start to use less than good predictions as a rationale for harsh punishments and severe legal sanctions."[55]

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[53] Monahan et al., *supra* note 7, at 1655; *see also, e.g.*, John Edens et al., *Assessment of "Juvenile Psychopathy" and Its Association with Violence*, 19 Behav. Sci. & L. 53, 59 (2001) (collecting evidence that psychopathy assessments may "tap construct-irrelevant variance associated with relatively *normative* and *temporary* characteristics of adolescence rather than deviant and stable personality features"); Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001) ("Assessing adolescents ... presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers."); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2004) (noting discontinuity and disappearance of mental disorders identified in adolescence).

[54] Moffitt, *supra* note 5, at 678.

[55] Loeber et al., *supra* note 7, at 333.

Moreover, it is just as difficult to predict future criminality among adolescents convicted of the most serious crimes.[56] A recent, major effort to identify risk factors for recidivism among serious adolescent offenders confirmed the "good news ... that even within a sample ... limited to those convicted of the most serious crimes, the percentage who continue to offend consistently at a high level is very small," while acknowledging the "bad news" that the ability to predict future criminality remains "exceedingly limited."[57] Most strikingly, when the homicide study discussed above limited its effort to predict future homicide offenses to boys who had already committed an act of violence, it "did not significantly improve predictive accuracy."[58] In fact, the false-positive rate *increased* from 87% to 89%.[59]

In sum, juveniles are still developing their character and identity, and it is quite likely that a juvenile of-

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[56] *See id.* (distinguishing, throughout, between serious and less serious forms of violence and theft).

[57] Edward Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 Dev. & Psychopathology 453, 468-470 (2010); *see also* Monahan et al., *supra* note 7 (finding that only 6% of serious juvenile offenders persisted in high levels of antisocial behavior into adulthood).

[58] Loeber & Farrington, *supra* note 31, at 88.

[59] *Id.* at 89; *see also* Alex Piquero et al., *Violence in Criminal Careers: A Review of the Literature from a Developmental Life-Course Perspective*, Aggression & Violent Behav. (forthcoming 2012) (concluding that "most youths who become violent do so in adolescence and their violent involvement is limited to the late teen/early 20s" and that "attempt[ing] to correctly predict the violent recidivist is virtually impossible").

fender will desist from crime in adulthood. *See Roper*, 543 U.S. at 570. Juvenile crime is likely to be the product of the "signature qualities of youth," *id.*; there is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character; and there is thus no reliable way to conclude that a juvenile—even one convicted of an extremely serious offense—should be sentenced to life in prison, without any opportunity to demonstrate change or reform.

D. Juveniles' Psychosocial Immaturity Is Consistent With Recent Research Regarding Adolescent Brain Development

Neuroscientists continue to accumulate evidence that the adolescent brain is not yet fully developed in critical respects. By now, "[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence," and "[a]lthough most of this work has appeared just in the last 10 years, there is already strong consensus among developmental neuroscientists about the nature" of these changes.[60] While research continues into the precise meaning and effect of the changes in the brain during adolescence, they are consistent with and suggest the possible physiological basis for adolescents' observed psychosocial immaturity.

The most noteworthy features of adolescent brain development relate to changes occurring within the brain's frontal lobes—in particular the prefrontal cortex—and in the connections between the prefrontal

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[60] Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psychologist 739, 742 (2009).

cortex and other brain structures. These areas and interconnections are critical to "executive" functions such as planning, motivation, judgment, and decision-making, including the evaluation of future consequences, the weighing of risk and reward, the perception and control of emotions, and the processing and inhibition of impulses.[61] Four related changes in these brain systems during adolescence merit special attention.

First, early adolescence (especially the period immediately after puberty) coincides with major changes in the "incentive processing system" of the brain involving neurotransmitters like dopamine.[62] "[R]eward-related regions of the brain and their neurocircuitry undergo particularly marked developmental changes

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[61] *E.g.*, Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* 23, 24, 141 (2001); B.J. Casey et al., *Structural and Functional Brain Development and its Relation to Cognitive Development*, 54 Biological Psychol. 241, 244-246 (2000); Elizabeth Sowell et al., In Vivo *Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999); Antonio Damasio & Steven Anderson, *The Frontal Lobes*, in *Clinical Neuropsychology* 404, 434-435 (Kenneth Heilman & Edward Valenstein eds., 4th ed. 2003) (one "hallmark of frontal lobe dysfunction is difficulty making decisions that are in the long-term best interests" of the individual).

[62] *E.g.*, Chein et al., *supra* note 35, at F2; Linda Spear, *The Behavioral Neuroscience of Adolescence* 149-150 (2009); Dustin Wahlstrom et al., *Developmental Changes In Dopamine Neurotransmission in Adolescence: Behavioral Implications and Issues in Assessment*, 72 Brain & Cognition 146, 150-151 (2010); Monique Ernst et al., *Neurobiology of the Development of Motivated Behaviors in Adolescence: A Window into a Neural Systems Model*, 93 Pharmacology Biochem. & Behav. 199, 206-208 (2009); Albert & Steinberg, *supra* note 11, at 217.

during adolescence."[63] These pubertal changes are seen in other species, and "have been linked to changes in reward-directed activity" among adolescents, especially the willingness to engage in risky and socially motivated behaviors.[64] The observed spike in risk-taking, reward-seeking, and peer-influenced behaviors among adolescents correlates with this normal aspect of adolescent brain development.

Second, during childhood and early adolescence the brain undergoes substantial synaptic "pruning"—the paring away of unused synapses—leading to more efficient neural connections.[65] During adolescence, this pruning is more characteristic of the prefrontal cortex than other brain regions, consistent with the observation that adolescence is a time of marked improvement in executive functions.[66]

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[63] Tamara Doremus-Fitzwater et al., *Motivational Systems in Adolescence: Possible Implications for Age Differences in Substance Abuse and Other Risk-Taking Behaviors*, 72 Brain & Cognition 114, 116 (2010); Steinberg, *supra* note 60, at 743.

[64] Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 Brain & Cognition 160, 161 (2010); Spear, *supra* note 62, at 18-19; Linda Van Leijenhorst et al., *What Motivates the Adolescent? Brain Regions Mediating Reward Sensitivity Across Adolescence*, 20 Cerebral Cortex 61, 67 (2010).

[65] Casey et al., *supra* note 61, at 242-243; Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 Proc. Nat'l Acad. Sci. 8174, 8175 (2004); Spear, *supra* note 62, at 81-90; Peter Huttenlocher, *Neural Plasticity: The Effects of Environment on the Development of the Cerebral Cortex* 41, 46-47, 52-58, 67 (2002).

[66] *E.g.*, Nitin Gogtay & Paul Thompson, *Mapping Gray Matter Development*, 72 Brain & Cognition 6, 7 (2010); Neir Eshel et

Third, the adolescent brain undergoes substantial myelination, the process through which neural pathways are insulated with a white fatty tissue called myelin. That insulation "speeds ... neural signal transmission," making "communication between different parts of the brain faster and more reliable."[67] "[M]yelination is ongoing well into late adolescence and early adulthood."[68] And this "improved connectivity within the prefrontal cortex is important for higher order functions subserved by multiple prefrontal areas, including many aspects of executive function, such as response inhibition, planning ahead, weighing risks and rewards, and the simultaneous consideration of multiple sources of information."[69]

Fourth, "well into late adolescence" there is "an increase in connections not only among cortical areas but between cortical and subcortical regions" that are "especially important for emotion regulation."[70] As the

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al., *Neural Substrates of Choice Selection in Adults and Adolescents*, 45 Neuropsychologia 1270, 1270-1271 (2007); Spear, *supra* note 62, at 87-90.

[67] Goldberg, *supra* note 61, at 144.

[68] Steinberg, *supra* note 60, at 743; *see* Rhoshel Lenroot et al., *Sexual Dimorphism of Brain Developmental Trajectories During Childhood and Adolescence*, 36 Neuroimage 1065, 1065 (2007).

[69] Steinberg, *supra* note 60, at 743; *see* Casey et al., *supra* note 61, at 245-246; Elizabeth Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. Neurosci. 8819, 8828 (2001).

[70] Steinberg, *supra* note 60, at 743; Spear, *supra* note 62, at 119-120, 125-126; Thomas Eluvathingal et al., *Quantitative Diffusion Tensor Tractography of Association and Projection Fibers in*

brain matures, that self-regulation is "facilitated by the increased connectivity between regions important in the processing of emotional and social information and regions important in cognitive control processes."[71] This developmental pattern is consistent with adults' superior ability to make mature judgments about risk and reward, and to exercise cognitive control over their emotional impulses, especially in circumstances that adolescents would react to as socially charged.[72]

In short, the brain systems that govern many aspects of social and emotional maturity, such as impulse control, risk avoidance, planning ahead, and coordination of emotion and cognition, continue to mature throughout adolescence.[73] Importantly, these changes occur at different times, with the rapid, pubertal changes in the brain's incentive and social processing systems outpacing the slower, steadier, and later-occurring changes in areas related to executive function

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Normally Developing Children and Adolescents, 17 Cerebral Cortex 2760, 2763-2764 (2007).

[71] Steinberg, *supra* note 60, at 743; Leah Somerville et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 Brain & Cognition 124, 128-129 (2010) (noting importance of white-matter development and the "functional network [in] mediat[ing] the ability to exert control in the face of emotion").

[72] Chein et al., *supra* note 35, at F7-F8; Steinberg, *supra* note 64, at 162; Spear, *supra* note 62, at 121-126.

[73] *See, e.g.*, Eshel et al., *supra* note 66, at 1270-1271; Kathryn Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 Law & Hum. Behav. 78, 79-80 (2008); Steinberg et al., *supra* note 10, at 1765.

and self-control.[74] Indeed, studies have shown that the prefrontal cortex is among the last areas in the brain to mature fully.[75] These findings suggest a

> basic framework, articulated in slightly different versions by many writers ... posit[ing] that middle adolescence is a time of heightened vulnerability to risky and reckless behavior because of the temporal disjunction between the rapid rise in dopaminergic activity around the time of puberty, which leads to an increase in reward-seeking, and the slower and more gradual maturation of the prefrontal cortex and its connections to other brain regions, which leads to improvements in cognitive control and in the coordination of affect and cognition. As dopaminergic activity declines from its early adolescent peak, and as self-regulatory systems become increasingly mature, risk-taking begins to decline.[76]

"From this perspective, middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving."[77]

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[74] Steinberg, *supra* note 64, at 161.

[75] Gogtay & Thompson, *supra* note 66, at 7; Casey et al., *supra* note 61, at 243; Spear, *supra* note 62, at 87-88.

[76] Steinberg, *supra* note 64, at 161; *see* Somerville et al., *supra* note 71, at 126-127.

[77] Steinberg, *supra* note 64, at 162.

Although the precise relationships between particular aspects of brain development and adolescent behavior continue to be studied, these findings regarding the neuroscience of adolescent development reinforce and expand upon the well-established behavioral findings discussed in *Roper* and *Graham*. They demonstrate that, even in late adolescence, important aspects of brain maturation remain incomplete. And those normal patterns of adolescent physiological development are correlated with the poor judgment and particular vulnerability to negative social influences that characterize adolescence and then subside in young adulthood. Unlike adults, juveniles may thus be expected to change as they age and their brains mature, evincing both fewer impulses toward reckless and criminal behavior and an increased ability to restrain such impulses.

II. SENTENCING JUVENILES TO LIFELONG IMPRISONMENT WITH NO OPPORTUNITY TO DEMONSTRATE REFORM IS A DISPROPORTIONATE PUNISHMENT

In *Graham*, this Court determined that a sentence of life without parole for juvenile offenders convicted of non-homicide offenses was constitutionally disproportionate punishment for two related reasons—both of which are equally powerful as applied to juveniles convicted of homicide.

First, juveniles' immaturity, vulnerability, and changeability—while in no way excusing their crimes—substantially lessen their culpability and undermine any justification for definitively ending their free lives. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569-570. The Court thus reaffirmed in *Graham* that "from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult." 130 S. Ct. at

2026-2027. At the same time, the Court recognized that "[l]ife without parole is an especially harsh punishment for a juvenile," because "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 2028. "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* In fact, a juvenile sentenced to life in custody not only serves a greater percentage of his life in prison, but suffers a unique deprivation: He will never experience adulthood—or the ability "to attain a mature understanding of his own humanity," *Roper*, 543 U.S. at 574—as a free person.

Sentences that foreclose any possibility of eventual release are thus particularly draconian for juveniles. Although adolescents can be expected to mature and reform as they age, such a sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days." *Graham*, 130 S. Ct. at 2027. Juvenile crimes are committed "while [the offender is] a child in the eyes of the law," *id.* at 2033, meaning that most juvenile offenders are sentenced to life imprisonment without ever having been initiated into such elementary aspects of adult society as voting, driving, marriage, parenthood, profession—even high-school graduation. For adolescent offenders, a sentence of "[l]ife in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Id.* at 2032. Given juveniles' reduced culpability and increased likelihood of reform, such a severe sanction—foreclosing any willingness even to consider release in the future—is mani-

festly disproportionate to the penological justifications for imposing it.

Neither this Court's precedent nor the research into adolescent development provides any reason why this analysis should be different in the case of juvenile homicide offenders. This Court first recognized the reduced culpability of adolescent offenders in the context of prohibiting the death penalty for juvenile homicide offenses, finding that even for older adolescents, and "even [for] a heinous crime," the immaturity, vulnerability, and changeability of juvenile offenders made it "less supportable to conclude that ... [a] crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. To be sure, more serious crimes call for more serious punishments. But there is no reason why the reduction in culpability associated with adolescence should vary according to the severity of the offense. Indeed, the best available research indicates that even serious juvenile offenders are far more likely than not to desist from criminality as they mature, and that it is equally true of the most serious offenders that "expert psychologists [cannot] differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573.[78]

Accordingly, the penological justifications for a sentence of life imprisonment without parole are weakened for juveniles who commit homicide, just as they are for other juvenile offenders. The retributive purpose of such a punishment is attenuated because "cul-

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[78] *See supra* p. 24 & nn. 56-59.

pability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571. Likewise, the same characteristics of juveniles that render them less culpable—their impulsivity, rash decision-making, biased attention to anticipated immediate rewards rather than longer-term costs, and lesser ability to consider and evaluate the future consequences of their actions—substantially weaken the deterrence justification for such punishment. *Id.*[79] Life without parole will unquestionably incapacitate a juvenile offender, but the Court rightly noted in *Graham* that justifying "life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible," when "[t]he characteristics of juveniles make that judgment questionable." 130 S. Ct. 2029. And it is particularly inappropriate to "forswear[] altogether the rehabilitative ideal," *id.* at 2030, with respect to offenders who are far more likely than any others to reform as both their character and their physical brain structure mature into adulthood.

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[79] Indeed, empirical studies evaluating the deterrent effect of laws mandating that juvenile offenders be transferred to the adult criminal justice system for certain crimes have concluded that the threat of adult criminal sanctions had no measurable effect on juvenile crime. *E.g.*, Simon Singer & David McDowall, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 Law & Soc'y Rev. 521, 526-532 (1988) (comparing juvenile arrest statistics before and after enactment of New York's transfer legislation and finding little measurable impact on serious juvenile crime); Eric Jensen & Linda Metager, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime & Delinq. 96, 100-102 (1994) (same for Idaho).

In short, this Court has recognized what research confirms: Adolescence is transitory, and juveniles change. Indeed, most adolescents who commit crimes will desist from criminal activity in adulthood. Because the adolescent self is not yet fully formed, there is no way reliably to conclude that an adolescent's crime is the expression of an entrenched and irredeemably malign character that might justify permanent incarceration. And, even in the case of the most serious offenses, there is no reliable way to distinguish the juvenile offender who might become a hardened criminal from the far more common offender whose crime is a product of the transient influences of adolescence itself. Sentencing a juvenile to life imprisonment "without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes," *Graham*, 130 S. Ct. at 2033, disregards entirely the signature characteristics of youth. And sentencing such an immature and less culpable juvenile to spend his entire adult life in prison, notwithstanding the likelihood that "[m]aturity can lead to ... remorse, renewal, and rehabilitation," *id.* at 2032, is grossly disproportionate punishment.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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JANUARY 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Nos. 10-9646 and 10-9647

Supreme Court, U.S.
FILED
JAN 16 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

ALABAMA,

Respondent.

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writs Of Certiorari To The Court Of Criminal Appeals Of Alabama And The Supreme Court Of Arkansas

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. INTERNATIONAL PRACTICE, OPINION AND TREATY OBLIGATIONS SUPPORT HOLDING LIFE SENTENCES WITHOUT PAROLE FOR JUVENILES UNCONSTITUTIONAL 5

A. International Practice and Opinion Inform the Court's Eighth Amendment Analysis 6

B. International Practice and Opinion Reject Sentences of Life Without Parole For Juvenile Offenders, Regardless of the Offense 15

1. Foreign Law and Practice Do Not Allow Juvenile Life Without Parole Sentences 15

2. International Human Rights Treaties and Institutions Reflect a Global Consensus Against Juvenile Life Without Parole Sentences 21

C. United States Treaty Obligations Are Relevant to Eighth Amendment Analysis 28

CONCLUSION 32

APPENDIX (Descriptions of *Amici*) ..... App. 1

TABLE OF AUTHORITIES

Page(s)

Cases

Atkins v. Virginia
536 U.S. 304 (2002) 12

Cal. Fed. Savings & Loan Ass'n v. Guerra
479 U.S. 272 (1987) ..... App. 6

Coker v. Georgia
433 U.S. 584 (1977) 4, 11

Enmund v. Florida
458 U.S. 782 (1982) 11, 12

Graham v. Florida
130 S. Ct. 2011 (2010) ..... *passim*

Grutter v. Bollinger
539 U.S. 306 (2003) ..... App. 6, App. 11

Kennedy v. Louisiana
554 U.S. 407 (2008) ..... App. 8

Roper v. Simmons
543 U.S. 551 (2005) ..... *passim*

Sosa v. Alvarez-Machain
542 U.S. 692 (2004) 7, 32

Thompson v. Oklahoma
487 U.S. 815 (1988) 12

Trop v. Dulles
356 U.S. 86 (1958) 10

United States v. Alvarez-Machain
504 U.S. 655 (1992) 32

United States v. Rauscher
119 U.S. 407 (1886) 32

Constitution

U.S. Constitution
Article VI, cl. 2 28
Eighth Amendment ..... *passim*

Declarations

Declaration of Independence para. 1 (U.S. 1776) 7

Rules

U.S. Supreme Court Rules
Rule 37.2(a) 2

Foreign Statutes and Cases

Argentina

César Alberto Mendoza, et al. (Perpetual imprisonment and confinement of adolescents) Case No. 12,651, Inter-Am. Ct. H.R., submitted June 17, 2011 4

Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 7, 2005, "Maldonado, Daniel Enrique / recurso de hecho" Fallos (M-1022-XXXIX) (Arg.), *available at* http://www.mpf.jusbaires.gov.ar/wp-content/uploads/csjn-maldonado-daniel-enrique-y-otro-sobre-robo-agravado-07-12-2005.pdf 20

Bahamas

Bahamian Penal Code
§ 41 19

Brunei

Children and Young Person's Order, Section 45(1), (3), and (5) 18

England and Wales

Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003 c. 44 17

Fiji

Fijian Penal Code
§ 25(1) 18

Sierra Leone

Children and Young Person's Act
§ 216 19

Tonga

(Cases)

Fangupo v. Rex; Fa'ooa v. Rex
[2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (147 2010) (Tonga) 19, 20

(Statutes)

Tongan Penal Code
§ 91(2) 19

Zambia

Penal Code Act of Zambia
§ 25(2) 19

International Cases

Juridical Condition and Human Rights of the Child, Advisory Opinion OC-17/02 (Ser. A.) No. 17 ¶ 103 Inter-Am. Ct. H. R. (Aug. 28, 2002) 24

In re Juveniles Sentenced to Life Without Parole in the United States of America, Petition P-161-06, Inter-Am. C.H.R. (2006) ..... App. 4

Michael Domingues v. United States
Case 12.285, Report No. 62/02, doc. 5 rev. 1 ¶ 83 Inter-Am. C.H.R. (2002) 23

North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20) 22

Treaties

American Convention on Human Rights
Article 19 23

American Declaration on the Rights and Duties of Man
Article VII 23

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) (*ratified by the United States*, S. Treaty Doc No. 100-20 (Oct. 27, 1990)) 29

Convention on the Rights of the Child, GA Res. 44/25, annex, 171, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) 22

International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S 171 (*entered into force* Mar. 23, 1976) (*ratified by the United States*, S. Treaty Doc. No. 95-20 (April 22, 1992)) 28, 29

International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) (*ratified by the United States*, S. Treaty Doc. No. 95-18 (Oct. 21, 1994)) 29

United Nations Documents

CERD, Concluding Observations on the United States ¶ 21, U.N. Doc. CERD/C/USA/CO/6 (May 8, 2008) 31

Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) 30

Comm. on Rights of the Child, Children's Rights in Juvenile Justice, General Comment No. 10 ¶ 78, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) 23

Concluding Observations of the Human Rights Committee: United States of America ¶ 14, U.N. Doc. CCPR/C/USA/CO/ 3/Rev.1 (Dec. 18, 2006) 30

H.R.C. Res. 2 ¶ 11, U.N. Doc. A/HRC/10/29 (Mar. 25, 2009) 26

Human Rights Comm., Comments on the United States of America ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 2395 (Sept. 15, 2006) 30

Human Rights Comm., General Comments http://www2.ohchr.org/english/bodies/crc/comments.htm 23

Rights of the Child, Comm'n on Human Rights Res. 2005/44 ¶ 27(c), U.N. Doc. E/CN.4/RES/2005/135, (April 19, 2005)..... 26

Rights of the Child, G.A. Res. 61/146, ¶ 31(a), 61st Session, U.N. Doc. A/Res/61/146 (Dec. 19, 2006)..... 25

Rights of the Child, G.A. Res. 62/141 ¶ 36(a), U.N. Doc. A/RES/62/141 (Dec. 18, 2007)..... 25

Rights of the Child, G.A. Res. 63/241 ¶ 43(a), U.N. Doc. A/RES/63/241 (Dec. 24, 2008)..... 25

Rights of the Child, G.A. Res. 64/146 ¶ 15, U.N. Doc. A/RES/64/146 (Dec. 18, 2009)..... 25

Rights of the Child, G.A. Res. 65/197 ¶ 17, U.N. Doc. A/RES/65/197 (Dec. 21, 2010)..... 25

Rights of the Child, G.A. Res. 65/213 ¶ 16, U.N. Doc. A/RES/65/213 (Dec. 21, 2010)..... 25

Rights of the Child, H.R.C. Res. 29 ¶ 30(a), U.N. Doc. A/HRC/7/RES/29 (Mar. 28, 2008)..... 26

Second Periodic Report by Belize to the Committee on the Rights of the Child ¶ 85, U.N. Doc. CRC/C/65/Add.29 (July 13, 2004)..... 18

U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, annex, ¶ 46, U.N. Doc. A/RES/45/112, (Dec. 14, 1990) 27

U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, annex, Rule 2, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) 27

U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, annex, Rule 17(b), U.N. Doc. A/40/33 (Nov. 25, 1985) 27

Other Authorities

136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) 29

138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) 29

140 CONG. REC. S7634-02 (daily ed. June 24, 1994) 29

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Amnesty International, Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005) ..... App. 1, App. 7

Blackmun, Harry A., *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39 (1994) 8

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Griffin, P., et al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State Transfer Provisions*, (National Center for Juvenile Justice 1998) www.ncjrs.org/pdffiles/172836.pdf 20

Human Rights Watch, *Thrown Away* ..... App. 7

Human Rights Watch, *When I Die They'll Send Me Home*.....App. 7

Response to *amicus* briefs of Sixteen Members of Congress, the State of Florida, and Solidarity Center with respect to international law before the U.S. Supreme Court *Graham v. Florida* (08-7412) and *Sullivan v. Florida* (08-7621) (Oct. 13, 2009) available at www.usfca.edu/law/docs/jlwop/graham/ 14

The Sentencing Project, *Juvenile Life Without Parole: Trends in Sentence Use Over Time* (May 2010) http://www.sentencingproject.org/doc/publications/jj_JLWOPTrends.pdf 21

Staloff, Darren, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and The American Founding* 250-251 (2005)..... 8

Van Zyl Smit, Dirk, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sentencing Rptr., No. 1, 39 (Oct. 2010).....16, 17

AMICUS BRIEF ON BEHALF OF PETITIONERS MILLER AND JACKSON

STATEMENT OF INTEREST[1]

Amnesty International, the Amsterdam Bar Association, the Austrian Bar (Österreichischer Rechtsanwaltskammertag, ÖRAK), the Barcelona Bar Association, the Bar Human Rights Committee of England and Wales, the Bar of Montreal,the Center for Constitutional Rights, Columbia Law School Human Rights Institute, the Czech Bar Association, the European Bars Federation/Fédération des Barreaux d'Europe, the General Council of the Bar (GCB) of South Africa, the Hong Kong Bar Association, Human Rights Advocates, Human Rights Watch, the Japan Federation of Bar Associations, the Law Council of Australia, the Law Society of England and Wales, the Law Society of New South Wales, the New Zealand Law Society, the Norfolk Island Bar Association, the Norwegian Bar Association, the Portuguese Bar Association, the Swedish Bar Association, the Union Internationale des Avocats (UIA-International Association of Lawyers), the University of Minnesota Human Rights Center, and the University of San Francisco (USF) Center

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[1] Counsel of record received timely notice of the intent to file this brief. Letters from all counsel consenting to its filing have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

for Law and Global Justice hereby request that this Court consider the present brief pursuant to Supreme Court Rule 37.2(a) in support of Petitioners. The interests of *amici* are described in detail in the Appendix.

Amici urge the Court to consider international law and opinion, as well as foreign practice, when applying the Eighth Amendment's clause prohibiting cruel and unusual punishments. International standards and practice prohibiting sentencing juvenile offenders to life in prison without the possibility of parole provide an important indicator of evolving standards of decency, which illuminate the contours of acceptable conduct under the Eighth Amendment. Treaties the United States is party to are relevant to this analysis. The United States is the only country in the world that does not comply with the norm against imposing life without possibility of parole sentences on offenders who are under the age of 18 at the time of the offense.[2]

Prohibiting the sentence imposed in these cases would bring the United States into alignment with one of the most widely accepted international human rights norms, and enhance compliance with treaty obligations. Formally recognizing the unconstitutionality of these sentences would uphold

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[2] Life without possibility of parole sentences are sometimes referred to by the acronym "LWOP." Similarly, juvenile life without the possibility of parole sentences are sometimes referred to as "JLWOP."

the Eighth Amendment principles that led this Court to strike down the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551 (2005), and juvenile life sentences without parole for non-homicide crimes in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

SUMMARY OF ARGUMENT

International law and opinion have informed the law of the United States since the adoption of the Declaration of Independence. The Founders were greatly influenced by international legal and social thought; and throughout U.S. history, courts have referred to international standards when considering the constitutionality of certain practices. This is particularly true with respect to the Eighth Amendment's "cruel and unusual punishments" clause. The point, as the Court explained in *Graham*, is not that the Eighth Amendment is governed by international law, but rather that as a matter of U.S. constitutional law, the Court must consider contemporary standards of decency, as informed by international (and foreign) law and practice. Thus, *amici* consider international law and practice with respect to sentencing of juvenile offenders to life without parole to be of particular relevance to this Court.

Virtually every other country in the world either has never engaged in or has rejected the sentencing of persons convicted of crimes committed when they were under 18 to life without possibility of parole. The few countries in which juveniles were previously reported to be serving life

sentences without parole have either changed their laws or explained that juvenile offenders can apply for parole.[3]

Universally accepted standards condemn sentencing juvenile offenders to life without the possibility of parole. All countries except the United States and Somalia are parties to the Convention on the Rights of the Child, which prohibits the sentence. Several treaties that the United States is party to have also been interpreted to prohibit the sentence.

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[3] There is one case in Argentina that has raised questions about whether someone *might* be serving such a life sentence, but the sentence appears to be based on crimes committed as a juvenile and as an adult, and the sentence is otherwise subject to challenge under the laws of Argentina. (Communications with Argentinean Counsel for Saúl Cristian Roldán Cajal, emails on file with counsel for *amici*). Mr. Cajal's case is included in a petition pending before the Inter-American Court of Human Rights challenging life sentences with parole. *See* Case No. 12,651, *César Alberto Mendoza, et al. (Perpetual imprisonment and confinement of adolescents)*, Inter-Am. Ct. H.R., submitted June 17, 2011.

As this Court has recognized in other cases, a small number of outlier jurisdictions does not detract from the importance of foreign and international opinion and practice. *E.g., Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (that only 3 of 60 nations retain death penalty for rape "not irrelevant" to constitutional analysis); *Roper*, 543 U.S. at 578 (non-unanimous but widespread adherence to norm informs contemporary standards of decency).

This Court considered international law when holding that the juvenile death penalty violates the Eighth Amendment, *Roper*, 543 U.S. at 575-79, and again when it struck down life sentences without parole for offenders under 18 convicted of non-homicide crimes. *Graham*, 130 S. Ct. at 2033-34. Many of the international norms considered in *Roper* and *Graham* apply equally to *any* life without parole sentences applied to juvenile offenders, and those norms equally support overturning Mr. Miller and Mr. Jackson's sentences here.

The community of nations rejects sentencing any juvenile offender to die in prison, whatever the offense. Allowing the practice to continue in the United States would be inconsistent with contemporary standards of decency and contrary to the Eighth Amendment. The appropriate remedy is to ensure that persons incarcerated for crimes committed when they were under the age of 18 have a meaningful opportunity to obtain release at the end of a term of years sentence or through parole consideration.

ARGUMENT

I. INTERNATIONAL PRACTICE, OPINION AND TREATY OBLIGATIONS SUPPORT HOLDING LIFE SENTENCES WITHOUT PAROLE FOR JUVENILES UNCONSTITUTIONAL

The United States is the only nation in the world that currently imposes life without parole

sentences on juveniles. *See* Connie de la Vega and Michelle Leighton, *Sentencing our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. Rev. 983 (2008). Most governments never allowed, expressly prohibit, or currently do not impose such sentences on children. *Id.* at 989-90. While a few countries other than the United States have statutory language that arguably permits sentencing juvenile offenders to life without parole, there is no known person to be serving such a sentence anywhere in the world other than the United States. *Id.* at p. 990.

Pursuant to *Graham v. Florida* and this Court's jurisprudence, the laws of other countries and international practice and opinion are relevant to the determination of whether a sentence is cruel and unusual under the United States Constitution. *Graham*, 130 S. Ct. at 2033-34; *see also Roper*, 543 U.S. at 575-79. There is clear international consensus against sentencing a juvenile offender to die in prison, and of equal importance, the United States is party to human rights treaties that have been interpreted to prohibit life sentences for juvenile offenders. The Court should consider both of these factors in determining whether the sentences at issue violate the Eighth Amendment.

A. International Practice and Opinion Inform the Court's Eighth Amendment Analysis

The laws of the United States reflect the influence of laws and opinions of other members of the international community. Indeed, the

Declaration of Independence itself speaks to the significance of other nations:

> When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation.

The Declaration of Independence para. 1 (U.S. 1776) (emphasis added). This Court has recognized that history and noted that:

> For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-30 (2004).

In urging courts to afford the requisite "decent respect to the opinions of mankind" Justice Blackmun has explained that:

> [T]he early architects of our Nation understood that the customs of nations – the global opinions of mankind – would be binding upon the newly forged union. John Jay, the first Chief Justice of the United States, observed . . . that the United States "had, by taking a place among the nations of the earth, become amenable to the laws of nations."

Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 39 (1994) (citation and footnotes omitted).

Thomas Jefferson, drafter of the Declaration of Independence, had a keen appreciation for international opinion and law. He had a broad understanding of eighteenth century political thought, and was greatly influenced by European Enlightenment philosophers and their understanding of ancient Greek democracy and the Roman Republic. *See* Darren Staloff, *Hamilton, Adams, Jefferson: The Politics of Enlightenment and The American Founding* 250-51 (2005).

John Adams too understood the need to select the best the world had to offer in order to create a better government, and he believed that international opinion should inform the new nation's laws and institutions. *See* John Adams, *A Defence of the Constitutions of Government of the United States of America,* Preface, (1797), *available at*

http://www.constitution.org/jadams/ja1_00.htm (Da Capo Press Reprint ed., last visited Jan. 10, 2012).

Consistent with the approach of the Founders, this Court has recognized the relevance of international norms to the scope and content of societal norms and Constitutional rights. In *Roper*, this Court struck down juvenile death sentences, considering both the evolution of international law and practice in the global community as instructive for its interpretation of the Eighth Amendment's prohibition of "cruel and unusual punishments." *Roper*, 543 U.S. at 575-78.

In *Graham v. Florida*, the Court again recognized the value of "the judgment of the world's nations," citing foreign laws and international practice and opinion that prohibit life without parole for juveniles as evidence that "demonstrates that the Court's rationale has respected reasoning to support it." *Graham*, 130 S. Ct. at 2034. The Court in *Graham* further recognized that the U.N. Convention on the Rights of the Child, ratified by every country except Somalia and the United States, explicitly prohibits juvenile LWOP sentences, that countries had taken measures to abolish the practice in order to comply with the Convention on the Rights of the Child, and that the provisions and status of the Convention on the Rights of the Child are evidence of international opinion. *Id.* at 2033-34. The Court found that "'the United States now stands alone in a world that has turned its face against'" life without parole sentences for juvenile non-homicide offenders. *Id.* at 2034, (quoting *Roper*, 543 U.S. at 577).

In his concurrence, Justice Stevens reaffirmed the Court's reliance on international law for at least a century when interpreting the Eighth Amendment's "'evolving standards of decency.'" *Graham,* 130 S. Ct. at 2036 (Stevens, J., concurring) (quoting *Weems v. United States,* 217 U.S. 349, 373–378 (1910).). The rationale of *Graham* should apply equally to a life sentence without parole for a juvenile offender when the crime committed was a homicide.

In the past 50 years, this Court's jurisprudence on issues of cruel and unusual punishment has reflected "evolving standards of decency" in "civilized" society. The standards are not frozen in time, and the Court has consistently relied upon international law, practices and customs as part of the constitutional analysis. Indeed, the very constitutional provision at issue in this case, the Eighth Amendment's prohibition on "cruel and unusual punishments inflicted," traces its origin directly to the laws of another nation. The phrase "cruel and unusual" is derived from the "Anglo-American tradition of criminal justice" and the principle it represents goes back to the Magna Carta. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). The term was taken directly from the English Declaration of Rights of 1688. *Id.*

In *Trop v. Dulles,* the Court expounded upon the role of the fundamental norms of dignity and civility in interpreting the Eighth Amendment. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the

Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100. Recognizing that the text of the Eighth Amendment is "not precise" and its meaning "is not static," the Court has underscored that it is both appropriate and necessary to look abroad to "evolving standards of decency" to determine which punishments are so disproportionate as to be cruel and unusual. *Id.* at 100-01. Thus, the Court noted that the "civilized nations of the world are in virtual unanimity that statelessness [the punishment at issue in *Trop*] is not to be imposed as punishment for crime." *Id.* at 102.

In *Coker v. Georgia*, the Court again considered "the climate of international opinion concerning the acceptability of a particular punishment." *Coker*, 433 U.S. at 596 n.10. In support of its conclusion that a death sentence for a rape conviction was cruel and unusual, the Court acknowledged that "[it] is not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue." *Id.*

In *Enmund v. Florida*, the Court invoked *Coker* reiterating that international opinion is an additional consideration which is "not irrelevant." *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (quoting *Coker*, 433 U.S. at 596 n.10). The Court went on to find the death penalty cruel and unusual punishment for felony murder. *Id.* at 798 The Court, citing foreign law, noted that the "doctrine of felony murder has been abolished in England and India, severely restricted in Canada

and a number of other Commonwealth countries, and is unknown in continental Europe." *Id.* The decision also reflects foreign practice, stating "[i]t is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act." *Id.*

In *Thompson v. Oklahoma*, the Court recognized the relevance of the views expressed by "respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western community" when concluding that the Eighth and Fourteenth Amendments prohibited the execution of a defendant convicted of committing first degree murder when he was 15 years old. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Court further referenced its own practice of looking outward in its Eighth Amendment analyses: "[w]e have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual." *Id.* at 830 n.31. More recently, in *Atkins v. Virginia*, the Court stated: "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

In *Roper v. Simmons*, the Court relied upon the "evolving standards of decency" reasoning applied in *Trop* and *Thompson* and looked to international law, practice and opinion to

categorically prohibit juveniles from receiving the death penalty. *Roper*, 543 U.S. at 575-78 ("Yet at least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"). In applying the Eighth Amendment's prohibition on cruel and unusual punishment, the Court gave due deference to international treatment of juvenile offenders. "It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." *Id.* at 578.

In *Graham v. Florida*, the Court, quoting *Roper*, explicitly reaffirmed the relevance of international practice and opinion: "['The opinion of the world community, while not controlling our outcome,'] provide[s] respected and significant confirmation for our own conclusions." *Graham*, 130 S. Ct. at 2035 (quoting *Roper*, 543 U.S. at 578). Justice Stevens' concurrence acknowledges that "evolving standards of decency" have played a central role in Eighth Amendment jurisprudence for decades and will continue to do so.

> Society changes. Knowledge accumulates. We learn, sometimes, from our mistakes. Punishments that did not seem cruel and unusual at one time may, in the light of reason and

> experience, be found cruel and unusual at a later time; unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete. While Justice Thomas would apparently not rule out a death sentence for a $50 theft by a 7–year–old, the Court wisely rejects his static approach to the law. Standards of decency have evolved since 1980. They will never stop doing so.

Graham, 130 S. Ct. at 2036 (Stevens, J. concurring).[4]

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[4] Justice Thomas asserted that some countries' laws permit LWOP sentences *Id.* at 2053 n.12 (Thomas, J., dissenting), but as the very source he relied on explains, courts in those countries have *not* sentenced juvenile offenders to life without parole—for homicide or non-homicide offenses. *See* Child Rights International Network, Connie de la Vega, et. al., Human Rights Advocates, *Statement on Juvenile Sentencing to Human Rights Council*, 10th Sess. (Nov. 3, 2009), available at http://www.crin.org/resources/infodetail.asp?ID=19806 ("Currently, there is no evidence of any country, besides the United States, with juvenile offenders sentenced to life without the possibility of release."); *see also* Response to *amicus* briefs of Sixteen Members of Congress, the State of Florida, and Solidarity Center with respect to international law before the U.S. Supreme Court *Graham v. Florida* (08-7412) and *Sullivan v. Florida* (08-7621) (Oct. 13,

The global consensus against the death penalty and life without parole sentences for juveniles informed the United States Supreme Court's decisions to strike down those sentencing practices as cruel and unusual punishments in *Roper* with respect to death penalty and in *Graham* with respect to JLWOP for non-homicide crimes. *Roper,* 543 U. S. at 578; *Graham,* 130 S. Ct. at 2033-2034. Similarly, international consensus regarding juvenile life without parole sentences for homicide offenses should inform the Court's analysis here.

B. International Practice and Opinion Reject Sentences of Life Without Parole For Juvenile Offenders, Regardless of the Offense

Foreign law and practice, and international agreements, including treaties to which the U.S. is a party, reflect a global consensus that life without parole sentences should be prohibited, regardless of the crime, if the offender was under the age of 18 at the time the crime occurred.

1. Foreign Law and Practice Do Not Allow Juvenile Life Without Parole Sentences

As international human rights law has developed and gained broader acceptance, most countries have followed suit, eliminating sentencing practices that contravene human rights

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2009), available at www.usfca.edu/law/docs/jlwop/graham/.

principles. But there is nothing new or revolutionary about recognizing the impermissibility of sentencing juvenile offenders to life without parole. Indeed, very few countries have *ever* imposed life sentences on juvenile offenders. *Sentencing our Children to Die, supra*, at 989-1007. Most governments (unlike the United States) have either never allowed, expressly prohibited, or in practice do not impose such sentences on juvenile offenders. *Sentencing our Children to Die, supra*, at 989-90.

Consistent with international law, practice and opinion, an irreducible sentence of life imprisonment is not imposed on a child in any country in Europe. The majority of European countries do not allow any type of life sentences for juvenile offenders. *See* Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sentencing Rptr., No. 1 at 39-48 (Oct. 2010). Generally, throughout Europe, the maximum sentence for juvenile offenders is ten years, though this may increase up to 15 years in cases that involve a very serious crime. *Id.* (citing Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty-- Comparative Aspects*, Juvenile Justice Systems in Europe—Current Situation and Reform Developments 1772 (2010)).

The range of permissible sentences varies by country: the maximum sentence in Portugal is three years (including for murder); the maximum in Switzerland is four years (including for murder);

it is five in the Czech Republic; 10 in Estonia, Germany and Slovenia; and up to 20 in Greece and Romania. *Id.*[5] In England and Wales, a person under 21 cannot receive a whole life tariff, the equivalent of an LWOP sentence, because Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003 restricts such sentences to persons aged 21 or older.[6] In the Netherlands and Scotland, there is the (theoretical) possibility of life imprisonment *with* the possibility for parole, restricted to juveniles at least 16 years in age. *Id.* But in none of those countries do the courts impose sentences of life *without* parole on juvenile offenders.

Other than the United States, some of the few countries that previously allowed JLWOP sentences have since ended the practice in accordance with their international human rights law obligations. *Sentencing our Children to Die*, *supra*, at 996-1004. Tanzania has committed to allow parole for the one under-18 offender potentially serving the sentence and to clarify its laws to prohibit the punishment. *Id.* at 996-99. Israel has clarified that parole consideration is available to juveniles serving the sentence, and South Africa has clarified that such sentences are not permitted. *Id.* at 999-1004. That the few countries that potentially had juvenile offenders serving a life without parole sentence have clarified

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5 This is applicable only in cases where the sentence for an adult offender would be life imprisonment.

6 *See* Schedule 21, ¶ 1 and § 269(4) of the Criminal Justice Act 2003, c.44.

that they allow for parole hearings in accordance with the international legal norms is further evidence that the sentence is not permitted under any circumstances.

Of the ten countries identified in 2007 as having laws that could permit the sentencing of juvenile offenders to life without parole (other than the United States)—Antigua and Barbuda, Argentina, Australia, Belize, Brunei, Cuba, Dominica, Saint Vincent and the Grenadines, the Solomon Islands, and Sri Lanka—there are no known cases where the sentence has been imposed. *Id.* at 990.[7] The majority of nations do not apply

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[7] Additional research clarifies that "life sentence" in Belize means 18-20 years without parole. Second Periodic Report by Belize to the Committee on the Rights of the Child ¶ 85, U.N. Doc. CRC/C/65/Add.29 (July 13, 2004). In Brunei, while an offender under 18 may be detained during "His Majesty the Sultan and Yang Di-Pertuan's pleasure," the statute also provides that the child or young person (ages 14-18) may be released at any time and the case must be reviewed at least once a year. Children and Young Person's Order 2006, Section 45(1), (3), and (5).

Five additional countries have been identified as having similar ambiguous statutory language — Zambia, Sierra Leone, Fiji, Tonga and the Bahamas — but there is no evidence that any of these countries in fact imposes JLWOP. Each of these countries is party to the Convention on the Rights of the Child. While the penal codes in these jurisdictions have ambiguous language regarding JLWOP, the wording of the statutes suggests that there remains some mechanisms for review of life sentences or for potential release. Section 25(1) of the Fijian Penal Code specifies that "the court shall sentence such

person to be detained during the Governor-General's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the Governor-General may direct, and whilst so detained shall be deemed to be in legal custody," providing discretion in the sentencing. Tongan Penal Code Section 91(2) notes that "[e]very person who attempts to commit murder shall be liable to imprisonment for life or any less period," and Tongan Courts have looked to human rights instruments regarding the validity of punishments. *See Fangupo v. Rex; Fa'oos v. Rex* [2010] TOCA 17; AC 34 of 2009; AC 36 of 2009 (147 2010) (Tonga) (overturning sentence of judicial whipping because contrary to Tonga's international legal obligations under the Convention Against Torture). Chapter 97 section 41 of the Penal Code of the Bahamas provides that those under the age of 18 are "to be detained during Her Majesty's pleasure; if so sentenced he shall notwithstanding anything in the other provisions of this Act," suggesting that a later review of the sentence is possible. Additionally, in Sierra Leone, section 216 of the Criminal Procedures Acts specifies that the juvenile should be confined to a chosen place as may be directed by the president and for a stated period of time until a juvenile's reformation and transformation is guaranteed. Although this does not prohibit JLWOP, it does suggest that there is evaluation of juveniles during incarceration and upon rehabilitation the potential for release. Finally, the Penal Code Act of Zambia Section 25(2) notes that "the court shall sentence him to be detained during the President's pleasure; and when so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct." This, in conjunction with subsection (3), which states that "the presiding Judge shall forward to the President a copy of the notes of evidence taken at the trial, with a report in writing signed by him

juvenile life without parole sentences because such sentences violate the principles of child development and protection established through national standards and international human rights law. *Id.* at 989. Courts in other countries often refer to the treaty obligations in cases involving human rights. *See, e.g.* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Dec. 7, 2005, "Maldonado, Daniel Enrique / recurso de hecho," Fallos (M-1022-XXXIX) (Arg.), *available at* http://www.mpf.jusbaires.gov.ar/wp-content/uploads/csjn-maldonado-daniel-enrique-y-otro-sobre-robo-agravado-07-12-2005.pdf (overturning life sentence of 14 year old offender for violating the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the Convention Against Torture as well as Argentinean laws); *Fangupo v. Rex; Fa'ooa v. Rex, supra*, (Tonga) (citing Convention Against Torture as basis for overturning sentence of judicial whipping).

Even in the United States, the sentence was not used on a large scale until the 1990s when 40 states passed laws making it easier to try juveniles as adults. *See* P. Griffin, et al., *Trying Juveniles as Adults in Criminal Court: An Analysis of State*

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containing such recommendation or observations on the case as he may think fit to make" indicates that some discretion remains after the juvenile has been sentenced.

Transfer Provisions Foreword (National Center for Juvenile Justice 1998) www.ncjrs.org/pdffiles/172836.pdf. Before the 1990s, the sentence was imposed relatively infrequently anywhere. The Sentencing Project, *Juvenile Life Without Parole: Trends in Sentence Use Over Time* (May 2010), http://www.sentencingproject.org/doc/publications/jj_JLWOPTrends.pdf. As of 2008, the United States was the only nation where juveniles served life sentences without the possibility of parole.

2. International Human Rights Treaties and Institutions Reflect a Global Consensus Against Juvenile Life Without Parole Sentences

International agreements and resolutions reflect that the community of nations rejects sentencing juveniles to life without parole regardless of the crime committed. *See, e.g.*, *Graham*, 130 S. Ct. at 2033-34. The Convention on the Rights of the Child, the most widely ratified human rights treaty, specifically condemns this practice. As noted in *Graham*, Article 37(a) of the Convention on the Rights of the Child, "prohibits the imposition of 'life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age.'" *Graham*, 130 S. Ct. at 2034 (citation omitted).[8] Article 37(b) of

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[8] Because all countries in the world, aside from the United States and Somalia, are parties to the Convention, the practice of nations in this regard is arguably done pursuant to their legal obligations. In light of the practice and overwhelming authority

the Convention further provides that imprisonment be used only as a measure of last resort for juvenile offenders, and for the shortest appropriate time. U.N. Convention on the Rights of the Child, GA Res. 44/25, annex, 171, U.N. Doc. A/RES/44/25 (Nov. 20, 1989). Neither of those treaty provisions distinguishes between homicide and non-homicide offenses. Because Petitioners Miller and Jackson's sentences allow no possibility of release and are not the shortest appropriate time available, they are inconsistent with the Convention on the Rights of the Child and the international practice and opinion it reflects.

The significance of offender age in criminal sentencing is further highlighted by the fact that Article 37 sets a specific age ("below 18 years of age") in relation to sentences of life without parole, in contrast with other rights which in Article 1 defers to domestic laws for the age of majority. In early 2007, the authoritative Committee on the Rights of the Child, which oversees the Convention, reiterated that article 37 prohibits the death penalty and life without parole for offenders under eighteen years of age at the time of the offense. *See*

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prohibiting the sentence, the standard at a minimum may be considered as customary international law. *See North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 42 ¶ 71 (Feb. 20) (recognizing passage of treaty rule into the "general *corpus* of international law" as "one of the recognized methods by which new rules of customary international law may be formed").

Comm. Rts. Child, Children's Rights in Juvenile Justice, General Comment No. 10 ¶ 78, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).[9]

The prohibition on the juvenile death penalty and juvenile sentences of life without parole is also required to ensure the rights to humane treatment, dignity and personal liberty of children that are codified in the *corpus juris* of the Organization of American States. *See* American Declaration of the Rights and Duties of Man, art. VII (establishing the right of "all children . . . to special protection, care and aid"); American Convention on Human Rights, art. 19 ("Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state"); *Michael Domingues v. United States*, Case 12.285, Report No. 62/02, doc. 5 rev. 1 ¶ 83 Inter-Am. C.H.R. (2002) (Art. 19 of the American Convention and Art. VII of the American Declaration reflect "the broadly-

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[9] Specifically, the Committee has recommended that "parties abolish *all* forms of life imprisonment for offences committed by persons under the age of eighteen." "For *all* sentences imposed upon children the possibility of release should be realistic and regularly considered." *Id.* ¶ 77 (*emphasis added*). General Comments constitute the authoritative interpretation of the Committee on the Rights of the Child, established by the Convention to administer the treaty. *See* http://www2.ohchr.org/english/bodies/crc/comments.htm. The prohibition of juvenile life without parole sentences has also been recognized as an obligation under treaties that the United States is party to. See, section C below.

recognized international obligation of states to provide enhanced protection to children"); *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 (Ser. A.) No. 17 ¶ 103 Inter-Am. Ct. H. R. (Aug. 28, 2002) ("measures that involve deprivation of liberty must be exceptional").

Beyond the rule's clarity in treaty law, a near universal consensus has coalesced over the past seventeen years that the sentence must be legally abolished, and the consensus has been repeatedly affirmed in recent years. Myriad United Nations resolutions adopted by consensus or upon vote, with the support of every country represented except the United States, call for abolition of the juvenile death penalty and life sentences without parole. Since 2009, however, *even the United States* has joined the consensus against the use of this sentence in votes on resolutions at the General Assembly.

Every year since 2006, in its annual Rights of the Child resolution, the United Nations General Assembly has called for immediate abrogation of the juvenile LWOP sentence by law and practice in any country still applying the penalty. From 2006-2008, the United States cast the lone dissenting vote. For example, on December 19, 2006, the General Assembly resolved by a vote of 185 to one (the United States) that nations should "abolish by law, as soon as possible, the death penalty and life imprisonment without possibility of release for those under the age of 18 years at the time of the commission of the offence." Rights of the Child, G.A. Res. 61/146 ¶ 31(a), U.N. Doc. A/Res/61/146

(Dec. 19, 2006). The General Assembly adopted a similar resolution by a vote of 183 countries to one (the United States) in December of 2007, Rights of the Child, G.A. Res. 62/141 ¶ 36(a), U.N. Doc. A/RES/62/141 (Dec. 18, 2007), and again in 2008 (the United States was the only vote against). Rights of the Child, G.A. Res. 63/241 ¶ 43(a), U.N. Doc. A/RES/63/241 (Dec. 24, 2008).

In 2009 and 2010, the General Assembly affirmed the earlier resolutions, including the directive to abolish juvenile life without parole sentences, by a full consensus *without* a dissenting vote from the United States. Rights of the Child, G.A. Res. 64/146 ¶ 15, U.N. Doc. A/RES/64/146 (Dec. 18, 2009), and Rights of the Child, G.A. Res. 65/197 ¶ 17, U.N. Doc. A/RES/65/197 (Dec. 21, 2010). In 2010, the General Assembly adopted a resolution on the administration of justice specifically requesting that countries abolish the death penalty and life imprisonment without the possibility of release for offenders under eighteen years of age. The resolution on the administration of justice passed by consensus, without a dissenting vote from the United States. Human rights in the administration of justice, G.A. Res. 65/213 ¶ 16, U.N. Doc. A/RES/65/213 (Dec. 21, 2010).[10]

In its first substantive resolution on the Rights of the Child, the recently created United Nations Human Rights Council included the prohibition of juvenile life without parole

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[10] The texts of the 2011 General Assembly resolutions are not yet available online.

sentences. Rights of the Child, H.R.C. Res. 29 ¶ 30(a), U.N. Doc. A/HRC/7/RES/29 (Mar. 28, 2008), along with the prohibition of the death penalty for offenders under the age of 18 at the time of the crime.[11] In 2009 the Council again urged "States to ensure that, under their legislation and practice, neither capital punishment nor life imprisonment without the possibility of release is imposed for offences committed by persons under 18 years of age." Human rights in the administration of justice, in particular of children and juvenile justice, H.R.C. Res. 2 ¶ 11, U.N. Doc. A/HRC/10/29 (Mar. 25, 2009). In 2005, the U.N. Commission on Human Rights (predecessor to the U.N. Human Rights Council) called specifically for governments to prohibit juvenile LWOP sentences along with the juvenile death penalty. Rights of the Child, Comm'n on Human Rights Res. 2005/44 ¶ 27(c), U.N. Doc. E/CN.4/2005/135 (April 19, 2005).[12]

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[11] The Commission on Human Rights was replaced by the Human Rights Council in 2005. The Human Rights *Committee* remains. Like the Commission, the Council is made up of government delegates.

[12] As in the UN General Assembly, members of the Commission on Human Rights acted as representatives of their governments, which means that a Commission resolution reflected government opinion. The resolution calling for abolition of juvenile life without parole sentences emerged from a series of pronouncements from the Commission, from 1997 through 2004, emphasizing the need for the global community to comply with the principle that depriving juveniles of their liberty should only be a measure of last resort and for the shortest appropriate time, i.e., the opposite of an inflexible sentence that

These resolutions followed many years of other pronouncements calling for limited juvenile incarceration. In 1985, for example, the General Assembly adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, reiterating that confinement shall be imposed only after careful consideration and for the shortest period possible. U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, annex, Rule 17(b), U.N. Doc. A/RES/40/33 (Nov. 25, 1985). In 1990, the General Assembly passed two other resolutions in support. *See* U.N. Rules for the Protection of Juveniles Deprived of Their Liberty, G.A. Res. 45/113, annex, Rule 2, U.N. Doc. A/RES/45/113 (Dec. 14, 1990) (emphasizing imprisonment as a last resort and for the shortest time possible); U.N. Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, annex, ¶ 46, U.N. Doc. A/RES/45/112 (Dec. 14, 1990).

Because the two sentences at issue here are out of step with international law, practice and opinion, there is compelling support to find that this sentencing practice is cruel and unusual. As the Court found in *Graham*, "the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Graham*,

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requires imprisonment for a juvenile offender's whole life. *Sentencing Our Children to Die*, *supra*, at 1017-18 & n. 182.

130 S. Ct. at 2034. Further, in the inquiry of whether a punishment is cruel and unusual, "'the overwhelming weight of international opinion against' life without parole for non homicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'" *Id.* (quoting *Roper*, 543 U.S. at 578). The weight of global law, practice and opinion against life without parole for any under-18 offender, regardless of offense, similarly supports the conclusion that such a sentence is unconstitutional.

C. United States Treaty Obligations Are Relevant to Eighth Amendment Analysis

The United States is a party to several treaties that have been interpreted by their oversight bodies, and recognized by states parties, to prohibit juvenile life without parole sentences. As a treaty party, the United States has assumed international legal obligations that should inform the Court's Eighth Amendment analysis. And under the Constitution, the states of the United States must uphold these treaty obligations. U.S. Const. art. VI, cl. 2.

Treaties relevant to the Court's analysis include: (1) the International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S 171 (*entered into force* Mar. 23, 1976) (*ratified by the United States*, S. Treaty Doc. No. 95-20 (April 22, 1992)); (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Convention

Against Torture"), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (*entered into force* June 26, 1987) (*ratified by the United States*, S. Treaty Doc No. 100-20 (Oct. 27, 1990)); and (3) the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) (*ratified by the United States*, S. Treaty Doc. No. 95-18 (Oct. 21, 1994)). In ratifying these treaties, Congress stated, "the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments." 138 CONG. REC. S4781 (daily ed. Apr. 2, 1992) (for the International Covenant on Civil and Political Rights) (bold in original); *see also* 140 CONG. REC. S7634-02 (daily ed. June 24, 1994) (same understanding regarding the Convention on the Elimination of All Forms of Racial Discrimination); 136 CONG. REC. S17486-01 (daily ed. Oct. 27, 1990) (same understanding for the Convention Against Torture).

The prohibition on juvenile life without parole sentences has been recognized as an obligation of the International Covenant on Civil and Political Rights. In relation to articles 7 (cruel and unusual punishment) and 24 (treatment of children), the Human Rights Committee, the body established under the treaty to monitor compliance and provide interpretation, has stated that it "is of the view that sentencing children to life sentence without parole is of itself not in compliance with

article 24(1) of the Covenant. (articles 7 and 24)." Human Rights Comm., Comments on the United States of America ¶ 34, U.N. Doc. CCPR/C/USA/CO/3 2395 (Sept. 15, 2006) (hereinafter "Comments on the United States"). Further, the Human Rights Committee determined that a life without parole sentence contravenes Article 24(1), which states that every child shall have "the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State," and Article 7, which prohibits cruel and unusual punishment. Concluding Observations of the Human Rights Committee: United States of America ¶ 14, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006). Article 14(4) of the Covenant further requires that criminal procedures for juvenile persons should take into account their age and desirability of promoting their rehabilitation. International Covenant on Civil and Political Rights, art. 14(4).

The Committee Against Torture, the body established for oversight by the Convention Against Torture, in evaluating the United States' compliance with that treaty, found that life imprisonment of children "could constitute cruel, inhuman or degrading treatment or punishment" in violation of the treaty. Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America ¶ 34, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

Most recently, in 2008, the Committee on the Elimination of Racial Discrimination, the oversight

body for Convention on the Elimination of Racial Discrimination, found the juvenile without parole sentence incompatible with Article 5(a) of the Convention on the Elimination of Racial Discrimination because the sentence is applied disproportionately to youth of color, amounting to pervasive discrimination that the United States has failed to address. CERD, Concluding Observations of CERD on the United States ¶ 21, U.N. Doc: CERD/C/USA/CO/6 (May 8, 2008). The Committee referred to the concerns raised by the Human Rights Committee and Committee Against Torture on the United States practice of sentencing juveniles to life without parole and added its own conclusion:

> The Committee therefore recommends that the State Party discontinue the use of life sentence without parole against persons under the age of eighteen at the time the offence was committed, and review the situation of persons already serving such sentences.

Id.

In light of the U.S. Constitution and U.S. treaty obligations, this Court should consider the views of the treaty oversight bodies in determining whether a life sentence without parole for any under-18 offender violates the Eighth Amendment

prohibition against cruel and unusual punishments.[13]

CONCLUSION

As in *Roper* and *Graham*, this Court should consider the laws, practices and opinions of other nations and international agreements in interpreting and applying the Eighth Amendment. This Court should find these same principles, which have been applied to universally condemn in international law and practice the sentencing of juveniles to life in prison without parole, instructive in interpreting the Eighth Amendment here. Further, it should consider the provisions of treaties to which the United States is a party. For the reasons stated above, the sentences of Mr. Miller and Mr. Jackson should be overturned.

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[13] In considering the treaties for the purpose of interpreting the Eighth Amendment, the Court need not address the issue of whether the treaty provisions are self-executing or the validity of the non-self-executing declarations the United States submitted in connection with ratifying some of the treaties. For background and legislative history of the declarations, *see* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 Cinn. L. Rev. 423, 456-62 (1997). This Court has applied treaty provisions in defensive postures without considering whether they are self-executing. *See United States v. Rauscher*, 119 U.S. 407, 430 (1886); *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992) (*rev'd on other grounds, Sosa*, 542 U.S. at 692).

Respectfully submitted,

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Bar of Montreal
Center for Constitutional Rights
Columbia Law School Human Rights Institute
Czech Bar Association
European Bars Federation/Fédération des Barreaux d'Europe General Council of the Bar (GCB) of South Africa
Hong Kong Bar Association
Human Rights Advocates
Human Rights Watch
Japan Federation of Bar Associations
Law Council of Australia
Law Society of England and Wales

Law Society of New South Wales
New Zealand Law Society
Norfolk Island Bar Association
Norwegian Bar Association
Portuguese Bar Association
Swedish Bar Association
Union Internationale des Avocats (UIA-International Association of Lawyers)
University of Minnesota Human Rights Center
University of San Francisco Center for Law & Global Justice[14]

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[14] Research assistance was provided by Professor Julian Killingly, Birmingham City University School of Law and Solicitor of the Supreme Court (UK) and his students; Mark George, Queen's Counsel; and Hannah L. Gorman, Solicitor of the Supreme Court (United Kingdom); staff at the Law Society of England and Wales; Fellows and students at the University of San Francisco School of Law; and staff at Sheppard Mullin Richter & Hampton LLP.

APPENDIX

Amnesty International is a worldwide human rights movement of more than 2.2 million members and subscribers. It works independently and impartially to promote respect for human rights. It monitors domestic law and practices in countries throughout the world for compliance with international human rights law and international humanitarian law and standards, and it works to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. It has addressed the issue of juvenile life without parole and co-published the report *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005). It has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Amsterdam Bar Association ('Amsterdamse orde van Advocaten') is the professional body of lawyers, practicing in the district of the Amsterdam Court. The membership is mandatory. The Amsterdam bar organization, representing over 5,000 lawyers, has as a task to further good practice by lawyers and to protect the rights and interests of their members as lawyers, as well as the administration of justice.

The Austrian Bar (Österreichischer Rechtsanwaltskammertag, ÖRAK) is the official representation of lawyers in Austria, a public body determined by law, which is responsible for safeguarding their rights and affairs and their

representation at national, European and international level. It is as such particularly responsible for proposing legislative acts and rendering opinions on legislative projects as well as for notifying deficiencies in the administration of justice and administration to the competent body and providing proposals in order to improve the administration of justice and administration.

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body primarily concerned with the protection of the rights of advocates and judges around the world and with defending the rule of law and internationally recognized legal standards relating to the right to a fair trial. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Roper v. Simmons,* 543 U.S. 551 (2005) and *Sullivan v. Florida* and *Graham v. Florida,* 130 S. Ct. 2011 (2010).

The Barcelona Bar Association now has more than 21,000 members; 16,000 are active and 6,000 do not exercise as lawyers but enjoy certain rights as members of the Bar. The Association aims at guaranteeing the professional interests of the law profession but also watching for the accomplishment of the profession's deontological rules, with a distinct vocation for serving the community. The Association exercises

deontological control, regulates on matters of fees, fights against professional intrusion, organizes and provides legal aid to those with no financial resources, and to persons held in detention.

The Bar of Montreal, with over 13,000 members, is one of the largest bar associations in the world, as well as being the second largest French-speaking bar association. Its members' expertise covers all aspects of the legal practice, administration and business. Many of its members are recognized nationally and internationally in these fields. With more than 160 years of history, the Bar of Montreal is considered a model for its leadership in the pursuit of excellence in ethics and high standards of competence. The Bar of Montreal's mission is to protect the public. With this in mind, the Bar organizes a number of activities each year which inform members of the public of their legal rights and how they are to be exercised.

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is committed to the creative use of law as a positive force for social change.

Columbia Law School's Human Rights Institute (HRI), founded in 1998, serves as a crossroads for practitioners, scholars, and activists,

and as a focal point for Columbia Law School's human rights curriculum, programs and research. HRI leverages these academic resources into support for human rights in the United States and throughout the world. As part of its work to promote human rights in the United States, HRI, in conjunction with Columbia Law School's Human Rights Clinic, is co-counsel in *In re Juveniles Sentenced to Life Without Parole in the United States of America*, Petition P-161-06, Inter-Am. C.H.R. (2006), concerning the mandatory sentencing of juveniles in Michigan to life without the possibility of parole. HRI also participated as *amicus* in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Czech Bar Association is the biggest legal professional organization in the Czech Republic representing more than 8,500 lawyers. It is a self-governing organization performing public administration in the area of the Legal Profession and, as such, it protects and guarantees the quality of the provision of the legal services by lawyers.

The European Bars Federation/Fédération des Barreaux d'Europe (FBE) was founded in Barcelona on 23rd May 1992, as a successor to the « Conférence des Grands Barreaux d'Europe ». Its official headquarters are in Strasbourg. FBE membership is open to all national and local Bars and Law societies within the Council of Europe. Today, the FBE has 250 member bars, representing approximately 800 000 lawyers. Its principal objects are: to put in place common activity while respecting its members' autonomy and

independence; to establish a permanent link between Bars with the organization of periodic meetings; to represent the Advocacy with all the European Institutions; to promote the supremacy of law, the right to a fair trial and human rights, an item in which it is particularly and strongly involved this year; and to promote the harmonization of the profession in Europe equally in forensic activity and profession ethics, and all possible contacts with lawyers of the other Continents.

The General Council of the Bar (GCB) of South Africa is a voluntary association constituted by ten South African bars. The advocates who are members of the General Council of the Bar of South Africa are in private practice and are competitive specialist advocates who are experts in trial, motion court, appellate and opinion advocacy. One of GCB's objects is to promote the administration of justice.

The Hong Kong Bar Association is the professional organization of all practicing Barristers in Hong Kong totaling over 1,100 members. Matters of policy are decided by the Bar Council with the support of its various Special Committees. The Association is principally concerned in considering and taking appropriate action in respect of all matters concerning the legal profession in general and speaking up on issues relating to the administration of justice. The Association is a staunch supporter in upholding human rights and the rule of law.

Human Rights Advocates (HRA), a California non-profit corporation was founded in 1978 and has national and international membership. It endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. HRA has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for almost thirty years, where it has addressed the issue of juvenile sentencing. HRA has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal law. Cases it has participated in include: *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

Human Rights Watch is a non-profit, independent organization and the largest international human rights organization based in the United States. For over 30 years, Human Rights Watch has investigated and exposed human rights violations and challenged governments to protect the human rights of all persons, including youth and prisoners. To fulfill its mission, Human Rights Watch investigates allegations of human rights violations in the United States and over 80 countries throughout the world by gathering information from governmental and other sources, interviewing victims and witnesses, and issuing detailed reports. Where human rights violations have been found, Human Rights Watch advocates for the enforcement of those rights before

government officials and in the court of public opinion. In 2004, Human Rights Watch published *Thrown Away*, on youth offenders sentenced to life without parole in Colorado. In 2005, Human Rights Watch co-published *The Rest of Their Lives*, a national report on the sentencing of youth offenders to life without parole. Subsequently, in 2008, the organization published *When I Die They'll Send Me Home*, on the same topic in California. In 2009, the organization published updated national statistics on youth offenders serving life without parole throughout the United States. The organization has also advocated on the issue before the Committee against Torture, the Human Rights Committee, and the Committee on the Elimination of Racial Discrimination.

The Japan Federation of Bar Associations (JFBA) is an autonomous body comprised of the 52 bar associations in Japan, their individual members, and the legal professional corporations. Founded in 1949, the JFBA self-regulates the legal profession and strives to further the primary role of attorneys in society: the protection of fundamental human rights and the realization of social justice. Aiming for a judicial system that is familiar, open, and accessible to the public, the JFBA has been engaged in the reform of the judicial system.

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council represents its constituent bodies on national issues, and promotes the administration of justice, access to justice and general improvement of the law. Through this

representation the Law Council effectively acts on behalf of 56,000 legal practitioners in Australia. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Society of England and Wales is the professional body representing more than 138,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world. The Law Society regularly intervenes in cases that relate to its core mandate. It has previously submitted *amicus curiae* in cases before the United States Supreme Court, including *Kennedy v. Louisiana*, 554 U.S. 407 (2008) and *Sullivan v. Florida* and *Graham v. Florida*, 130 S. Ct. 2011 (2010).

The Law Society of New South Wales is the largest professional association of lawyers in Australia. The Law Society acts as the voice of the legal profession, representing the interests of over 21,000 members, encouraging debate and actively driving law reform issues through policy submissions and open dialogue with Governments, parliamentary bodies, the Courts and the Attorney General's Department. Endowed with co-regulatory duties with the Office of the Legal Services Commissioner, it sets and enforces professional standards, licenses solicitors to practice, investigates complaints and administers discipline to ensure that both the community and the

profession are properly served by ethical and responsible solicitors.

The New Zealand Law Society is the statutory regulator of the legal profession in New Zealand (currently comprising 11,500 practicing lawyers). The Law Society's regulatory functions include fundamental obligations to uphold the rule of law and the administration of justice, and it actively monitors and promotes the rule of law and human rights. The Law Society has previously made submissions as *amicus curiae* to this Court.

The Norfolk Island Bar Association is the professional body representing lawyers on and from Norfolk Island. It consists of barristers, solicitors and judicial officers. It is a corporate member of the International Bar Association, the Human Rights Institute and the European Association of Lawyers. Its members are active in many countries of the world.

The Norwegian Bar Association is the representative organization for more than 90% of the lawyers in Norway. The Association safeguards the basic principles of the legal profession, such as independence and professional confidentiality. Furthermore, the Association is the most important arena for the lawyers' political engagement in relation to the rule of law.

The Ordem dos Advogados Portugueses (OAP) in English, Portuguese Bar Association, was established by the State, Decree n.° 11 715, of 12 June 1926, over 85 years ago. However, its origins

trace even back to the Lisbon Lawyers Association, whose Statutes were approved in 1838. The Ordem dos Advogados is the only public and independent association (nationwide) compulsory representing law graduates who practice law and deliver legal services (advocacia) as a profession, presently counting 27,903 active Lawyers.

The Swedish Bar Association is the sole national organization for advocates in Sweden, a professional body representing more than 5,000 advocates. Its international focus includes upholding the independence of the legal profession, the rule of law and human rights in Europe and throughout the world.

The Union Internationale des Avocats (UIA-International Association of Lawyers) was created in 1927 and is the oldest professional association, with several thousand individual members, as well as more than 200 bar associations, organisations or federations (representing nearly two million lawyers) from over 110 countries. The objectives of the UIA are to promote the basic principles of the legal profession, to contribute to the establishment of an international legal order based on the principles of human rights and justice among nations, through the law and for the cause of peace, and to defend the moral and material interests of members of the legal profession.

The University of Minnesota Human Rights Center (HRC) is dedicated to the advancement of the fundamental rights guaranteed by national and international law. The HRC seeks to ensure that

all persons receive the full panoply of rights accorded to them by national and international law regardless of nationality or immigration status. The HRC maintains one of the largest human rights document collections in the United States (http://www.umn.edu/humanrts). In addition, the Co-Director of the University of Minnesota Human Rights Center has served from 1996 – 2003 as a member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights and thus has expertise in regard to the international human rights law applicable to this matter. The HRC has previously submitted amicus curiae briefs; for example, in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The University of San Francisco (USF) Center for Law and Global Justice is a focal point for USF School of Law's commitment to international justice and legal education with a global perspective. The Center generates student externships around the globe, protects and enforces human rights through litigation and advocacy, manages and participates in international rule of law programs in developing nations, develops partnerships with world-class foreign law schools, provides a forum for student scholarship, and nurtures an environment where student-organized conferences and international speakers explore topics relating to global justice. For over five years the Center has been working on projects addressing the sentencing of juvenile offenders.

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Nos. 10-9646 & 10-9647

FILED
JAN 17 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EVAN MILLER

Petitioner,

v.

STATE OF ALABAMA

Respondent.

KUNTRELL JACKSON

Petitioner,

v.

RAY HOBBS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND THE SUPREME COURT OF ARKANSAS

BRIEF OF AMICI CURIAE OF CERTAIN FAMILY MEMBERS OF VICTIMS KILLED BY YOUTHS IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Sentencing youths to life without the possibility of parole is unjust because their brains and sense of judgment are not fully developed, and they retain the potential for reform as they grow. 2

II. Despite experiencing the murder of a loved one at the hands of a youthful offender, many victims do not believe that a sentence of life without the possibility of parole is right for youths. 5

A. Victims Know That A Youthful Offender Lacks Maturity At The Time Of Their Crime. 6

Sharletta Evans 6

Mona Schlautman 7

Linda White 10

Bill Pelke 14

Aqeela Sherrills 17

B. Victims Know Youth Can Reform..... 19

Mary Johnson 19

Melanie Washington..... 22

Azim Khamisa 24

Tammi Smith 26

Robert Hoelscher 28

TABLE OF AUTHORITIES

Page

CASES

Atkins v. Virginia, 536 U.S. 304 (2002) 4

Baze v. Rees, 553 U.S. 3 (2008) 4

Coker v. Georgia, 433 U.S. 584 (1977) 4

Enmund v. Florida, 458 U.S. 782 (1982) 4

Furman v. Georgia, 408 U.S. 238 (1972) 3

Graham v. Florida, 560 U.S. ___ (2010) 1, 2

Harmelin v. Michigan, 501 U.S. 957 (1991) 4

Solem v. Helm, 463 U.S. 277 (1983) 4

Trop v. Dulles, 356 U.S. 86, 101 (1958) 2

United States v. Bajakajian, 524 U.S. 321 (1998) 4

OTHER AUTHORITIES

Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2004) 2

Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 742 (2000) 3

Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002) 3

L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAV. REVS. 417, 421 (2000) 3

Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 DEVELOPMENTAL REV. 1, 9-11 (1992) 3

The Victims' Rights Amendment, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) 2

INTEREST OF *AMICI*[1]

Amici, some of whom submitted testimonials as amici in *Graham v. Florida*, 560 U.S. ___ (2010) (slip opinion), are individuals who have lost family members to murder committed by youth, yet are opposed to life sentences for youth without the possibility of parole. While each account and experience is different, *amici* are united in their belief that, if given the chance, individuals incarcerated as children can change and become positive contributors to society.

SUMMARY OF ARGUMENT

Despite their devastating losses, *amici* know from experience what science confirms: children are fundamentally redeemable. *Amici* therefore believe youthful offenders should be offered a legitimate chance through rehabilitation to lead productive, law-abiding lives. *Amici* agree – fully – with the Court: "A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Graham*, Slip Op. at 48.

"Juveniles are more capable of change than are adults," *Graham*, Slip Op. at 39, and thus *amici* support a fair and balanced approach to sentencing youth for serious crimes such as murder. Such an approach should impose a sentence that offers the

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have filed blanket waivers with the Court consenting to the submission of all *amicus* briefs.

opportunity for the court to review and consider, even if many years later, whether individuals convicted of crimes as juveniles continue to pose a threat to the community, or whether they have shown signs of development, healing, rehabilitation, and the potential to become productive members of society.

Graham's "meaningful opportunity for release based on demonstrated maturity and rehabilitation" is not a guarantee of release to youth offenders, just a review – the opportunity to demonstrate that they are capable of making responsible decisions and that they do not pose a threat to society. A life sentence without possibility of parole, for a crime committed at 14, does not provide that opportunity. Even when children commit the ultimate crime, they should have the opportunity to prove they are worthy of a second chance.

ARGUMENT

I. SENTENCING YOUTHS TO LIFE WITHOUT THE POSSIBILITY OF PAROLE IS UNJUST BECAUSE THEIR BRAINS AND SENSE OF JUDGMENT ARE NOT FULLY DEVELOPED, AND THEY RETAIN THE POTENTIAL FOR REFORM AS THEY GROW.

The Eighth Amendment's prohibition of cruel and unusual punishment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality). One such measure is the respect the federal government and all 50 states have afforded victims' voices in

sentencing defendants, including juveniles. *See, e.g.*, Victoria Schwartz, Comment, *The Victims' Rights Amendment*, 42 Harv. J. on Legis. 525, 526 & n.13 (2005) (listing victims' rights statutes); Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (2004). *Amici* therefore urge the Court to hear their stories of loss and redemption.

Amici have experienced first-hand what the Court and science agree has always been true: adolescents are less capable of controlling their behavior than adults. Recent advances in psychological, neurological and behavioral studies objectively confirm that children cannot appreciate consequences and assess risk and harm the way adults can, in part because their brains continue to develop through their teen years. *See, e.g.*, L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neuroscience & Biobehav. Revs. 417, 421 (2000); Lita Furby & Ruth Beyth-Marom, *Risk Taking in Adolescence: A Decision-Making Perspective*, 12 Developmental Rev. 1, 9-11 (1992); Elizabeth Cauffman & Laurence Steinberg, *(Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 Behav. Sci. & L. 741, 742 (2000); Elizabeth R. Sowell et al., *Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study*, 44 Developmental Med. & Child Neurology 4 (2002). Given these truths about adolescent behavior, *amici* believe punishing children to the same extent as adults, when they cannot control their actions as well as adults, is wrong.

Thus, this group of victims writes in support of the petitioners and urges the Court to find that the sentence of life without the possibility of parole for a youth is excessive and unsupportable. "[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose." *Furman v. Georgia*, 408 U.S. 238, 331 (1972) (Marshall, J., concurring). The Court's criteria for determining what sanctions are excessive comes from not one but two different analyses. As the Court has stated many times, one factor is "objective criteria," such as legislative enactments (*See, e.g., Solem v. Helm*, 463 U.S. 277, 292 (1983); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *United States v. Bajakajian*, 524 U.S. 321 (1998). But a second and equally valid criteria for analysis of the question is the individual judgment of the members of this Court. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding death "excessive" for a mentally retarded defendant); *see Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty "excessive" for crime of rape a 16 year old); *see also, Enmund v. Florida*, 458 U.S. 782 (1982) (death excessive for a murderer who did not intend to kill). In his dissent in *Baze*, Justice Ginsburg pointed out that in *Atkins* in particular, this Court found "objective evidence, though of great importance, did not 'wholly determine' the controversy, 'for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" *Baze v. Rees*, 553 U.S. 35, 83 (2008), and 80 *citing Atkins*, 536 U.S. at 312 (*quoting Coker*, 433 U.S. at 597 (plurality opinion)).

The accounts of victims below show that sentencing needs to consider more than just proportionality – it is not just an eye for an eye. A reasoned sentence for youth who commit an act that took a life should strive to incorporate principles of restorative justice for the victim, the community and the criminal justice system, which includes the defendant. In this vein, the accounts here are about reconciliation and rejuvenation, not retribution. They are about finding a way to forgiveness and a newfound sense of peace where violence once reigned. These accounts demonstrate specific, documented efforts to make sense of tragic loss and find peace between parties who were brought together as a result of violence.

II. DESPITE EXPERIENCING THE MURDER OF A LOVED ONE AT THE HANDS OF A YOUTHFUL OFFENDER, MANY VICTIMS DO NOT BELIEVE THAT A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE IS RIGHT FOR YOUTHS.

Not in my name – that is the message resounding from victims in this brief. Through their vivid accounts, *amici* illustrate that constitutional standards cannot be met by sentences that ignore science and fail to address the needs of victims and their communities. Science already presented to this Court in the merits brief shows that youth – even youth who murder – lack critical developmental maturity. The same lack of full development that makes them susceptible to bad acts is the basis of their ability to reform – they are not yet fully accountable adults. *Amici* believe these offenders should be permitted to rehabilitate

themselves and return to society as positive, productive citizens.

A. Victims Know That A Youthful Offender Lacks Maturity At The Time Of Their Crime.

Sharletta Evans

Casson Xavier Evans was Sharletta Evans' younger son. On December 21, 1995, Casson was caught in the crossfire of a drive-by shooting, ending his life at age three. Sharletta had gone to her niece's house to pick up her niece's child. She left her sleeping younger son in the car with her six year old son and their older cousins. While inside her niece's house Sharletta heard gun shots and then broken glass. Once she accounted for the safety of everyone in the house, Sharletta returned to her car thinking nothing was wrong. But as she started to drive away, she realized Casson was bleeding and lifeless. He had been killed by a stray bullet.

Raymond Johnson, age 14, was charged as the shooter, Paul Littlejohn, age 15, was charged as the accomplice, and another boy, aged 14, was charged as the driver.

Sharletta attended each day of the trials of Raymond and Paul, who were tried as adults. Still in shock, overcome by grief and perplexed as to how children so young could get access to guns and commit such a violent crime, Sharletta let her family speak for her at the trial and during sentencing. She did not question the District Attorney's plan to use the boys 'as an example.'

It was not until 11 years after Casson's murder and several letters from by Raymond and Paul that Sharletta was able to begin to correspond

with them. As she started to compare the incarcerated boys to her son who was now reaching the same age as the offenders at the time of the crime, Sharletta realized she could not completely heal until she let the authorities know she wished her son's killers had a chance to redeem themselves.

Sharletta knew that, in particular, Raymond, who fired the bullet that killed her son, had changed. At arrest, Raymond could read at less than a third-grade level. Both of his parents had abandoned him, and he raised himself, with the help of grandparents. Over the years since the shooting, however, Sharletta has become aware that Raymond has changed. He has developed a faith in God, earned a GED, and kept a clean record in prison. Most importantly, he has expressed his remorse in his letters to Sharletta many times over the years since the shooting.

Sharletta has written to the Juvenile Clemency Board to request clemency for Raymond. Sharletta also founded the non-profit organization Red Cross Blue Shield Gang Prevention Inc. in 2003 to bring attention to restorative justice as a healing method that connects victims of violence to their offenders to achieve forgiveness and closure. In 2006, her home state of Colorado changed its law to allow life sentences for juveniles, but with the possibility of parole after 40 years. She is working on gathering support for a bill that would make this change in law retroactive to crimes committed since 1990.

Mona Schlautman

On October 8, 1992, 15-year-old Jeremy Drake was picked up by his 17-year-old friend, Jeremy

Herman, and a 19-year-old acquaintance, Christopher Masters. Herman's car stereo speakers had been stolen, and he believed that Drake knew where they were. Herman intended to use Masters' gun to scare Drake into revealing who had stolen the speakers, and Masters asked to come along for the ride. After driving around for several hours, Herman pulled into a park where Masters led Drake up a path and shot him. Herman pled guilty to kidnapping and was sentenced to life. Masters was also sentenced to life for the offense of first degree murder.

Mona Schlautman, Drake's mother, no longer remembers what she said when she testified at Herman's trial. She does, however, remember that she told him at his sentencing that she forgave him, and felt that her son would have wanted it that way. She recalls that "I was angry and I was upset, but just because of my own personal spiritual growth, I knew right away I needed to forgive – if not for him, for my own sake."

After the sentencing, Mona tried to contact Herman but had no success. Herman did the same but was unsuccessful until, through a private investigator, they connected and began exchanging letters around 2004. Mona met with Herman in 2005, and they have continued communicating by letters and phone calls ever since, allowing Mona to observe, firsthand, Herman's growth and progress. He went from a deeply troubled dropout to someone Mona regards as a well read and intelligent man.

A chance at parole – that is what Mona believes all youthful offenders should have. Though not all should get released, Mona was a supporter of Herman's release when his original life without parole sentence was recently reduced to 40 years in

prison. With credit for time served, Herman will likely be released within a year.

Reacting to the reduced sentence, Mona said she believed "He needed a chance at life. I couldn't discount what he had done, but he deserved a chance." Mona remarks that while nothing can bring her son back, no good is being done by keeping Herman in prison.

Her personal feelings match the science the Court acknowledged and relied upon in *Graham* about cognitive, emotional and even physical development of children. "Teenagers are not thinking with a full brain and make rash judgments without thinking," Mona observes. A mother of four, Mona has a heightened appreciation of the fact that children have the capacity to behave strangely as teenagers and differently from how they do later as adults.

Mona feels that everyone should be allowed a fair chance. Although she thinks it is good Herman went to prison, she is happy he is going to get out while still young enough to have a family. Criticizing the quality of rehabilitation programs in the prisons, Mona does not think prison prepares youth for successful reentry to society. She has seen them in custody "treated like animals."

To Mona, the best thing that Herman can do to make up for what he did is to come out and turn his life around. As a prisoner he remains a burden on taxpayers. He owes it to society to become a responsible, productive adult instead. "I'm glad he went to prison, I'm glad he did time and I'm glad he's getting out."

Linda White

"I forgive you, and God will, too." These were the last words Cathy White uttered before her teenage killers shot her three times in the back of the head. From that moment of tragedy, Cathy's mourning mother, Linda, began a journey from anger to forgiveness, together with her daughter's killer, to honor Cathy's memory.

Linda never imagined that she would become an ardent critic of the practice of sentencing youth to spend their lives in prison. She simply never confronted the issue until her 26-year-old daughter, Cathy, was kidnapped, raped, and killed by two teenaged boys. It was that tragic occurrence, on November 18, 1986, that set Linda along an unlikely path that led her to discover that youths who commit even the worst crimes can grow into responsible, mature adults capable of making real, positive impact in their communities. Linda knows this because she has watched her daughter's killer, Gary, become just such an adult.

Gary was only fifteen when he met his victim, two months pregnant at the time, at a gas station in Houston, near Cathy's home. Cathy had been moved by Gary's and his friend's plea for a ride out of town to help them escape abusive parents, and she had let the boys into her car. Almost immediately, the boys brandished a gun and forced Cathy to drive them toward Alvin. Before reaching their destination, they demanded Cathy pull over to the side of the road, where they raped her. The boys were high and drunk at the time, and in their compromised state, they decided to disable Cathy, (ostensibly to prevent her from calling the police) by shooting her in the leg. After the first shot, they reconsidered their

escape and reasoned that they would need to kill Cathy to eliminate the only witness to their crime. They shot her three times in the back of her head.

Linda did not learn of her daughter's murder for an excruciatingly long five days after Cathy had inexplicably disappeared from her home, during which time Gary and his friend were arrested on unrelated suspicions, confessed to the killing, and led police to Cathy's body. Gary's guilty plea and his 54-year prison sentence did little to assuage the deep sadness that Linda and the rest of her family—including Cathy's five-year-old daughter, Ami—felt. Nor did Linda feel that the sentence imposed was advancing the goals of the criminal justice system, notwithstanding the pro-prison rhetoric that she regularly encountered when speaking with others about the fate of Cathy's killers.

It was during this dark time in her life that the seeds of Linda's opposition to overly harsh prison sentences began to take root. While studying to be a death educator and grief counselor a year after Cathy's death, Linda found herself immersed in Hugo Adam Bedot's *Death Penalty in America*. By the time Linda completed the book, she knew that she simply had to confront the realities of the American penal system. She soon began conducting research into the theory behind prison sentences. Her research would eventually bring her into contact with prison inmates, where she would have the chance for the first time to directly interact with people who, like Gary, were facing the bleak prospect of spending most of their lives behind bars. Linda was increasingly drawn to the theory of restorative justice as she came to recognize that even the most hardened prisoners developed a sense of deep

remorse and desire to make amends for past misdeeds when given the chance.

The more Linda discovered, the more she engaged. In 1997, she began teaching upper level college courses in prison, and soon thereafter, she became involved in Bridges to Life, a mediation program allowing convicts and victims of others' crimes to open a dialogue, learn, and forgive. Linda came to know many prisoners who yearned for—and, to her mind, deserved—a second chance, and she grew to increasingly believe that it is deeply unjust and excessively punitive to deny convicts who have been fundamentally changed by their time in prison that opportunity.

Ironically, the convict who had set her along this path was "not on her radar screen" for many years. After pleading guilty and receiving his sentence, Gary had served out his first several years without much apparent personal change. He continued to get into trouble in prison (much as he had before his conviction) until several years into his sentence, when he was befriended by another inmate. As a result of the relationship that Gary developed with that inmate and his family, he began exhibiting remorse for his misconduct and eventually agreed to a meeting with Linda. Linda was eager for the meeting but wondered if she would be capable of showing Gary the same compassion that she had shown to countless other convicts with whom she had no personal history.

She need not have wondered. When Linda and Gary met, Linda found that he was a different person from the child who had callously raped and killed her daughter. Gary was a remorseful grown man who was desperately seeking both forgiveness and a chance to start making up for all of the hurt

that he had inflicted. Linda, true to her nature, was more than willing to grant Gary forgiveness, and he eventually earned the second chance he so desperately wanted. As of the filing of this brief, Gary has been out of prison on parole for just over one year. In that time, he has immersed himself in a new community; found and held a job; and begun working with drug and alcohol addicts at his church in a role in which his minister says he has made an incredible difference. Gary has kept himself away from any sign of trouble. He is in regular contact with Linda, and the two are planning to try to begin giving talks at Texas juvenile facilities. Gary never stops apologizing for the pain that he caused, and he regularly tells Linda that he wants to live a good, impactful life as a "memorial" to Cathy.

To Linda, Gary is a poster child for why life sentences are so unjust, especially for juveniles. From her research and experience, Linda knows that youths are both less able to fully appreciate the consequences of their actions and more likely to change in a relatively short period of time. To her, even the most horrific of crimes—the type to which her daughter fell victim—cannot justify locking someone away without giving them a second chance. Her daughter's murder, like so many others, resulted in large part from an extreme but forgivable failure by children to exercise the mature judgment that comes with age and experience. Cathy's teenaged killers, while drunk and high, made an impulsive decision to kidnap, rape, and murder her. Linda strongly believes that Gary and other youthful offenders need to be locked away so that they have the chance to contemplate their actions, to grow, and to mature. And by no means does she believe that convicts should be set free if they fail to show

remorse and simply do not demonstrate a desire to make amends. But Linda also knows that it is wrong to categorically deny youths the opportunity to earn a second chance.

Had Gary been sentenced to serve life without the possibility of parole, he would never have been able to become a living memorial to Cathy. To Linda, to keep Gary and the many, many others like him locked away for their whole lives would only compound the ugliness of crime with the ugliness of a draconian, unjust prison sentence. Linda does not want that, and she knows that Cathy would not have wanted that either. "Cathy," Linda says, "would be gratified to see Gary have a second chance."

Bill Pelke

On May 14, 1985, Ruth Pelke, a 78-year-old grandmother fondly known as Nana, was brutally murdered when four teenage girls broke into her home in search of money for the local arcade. Armed with the knowledge that Ruth gave Bible lessons in her home to children in the neighborhood, the girls arrived at her front door under the pretext of wanting a Bible lesson. As Ruth reached for her Bible teaching materials, one girl hit Ruth over the head with a vase. Paula Cooper, aged 15, then proceeded to stab Ruth to death – inflicting 33 stab wounds. Once they had killed Ruth, the girls absconded with a mere $10 and the keys to Ruth's old car.

Bill Pelke, Ruth's grandson, was a father of children of similar ages to the assailants. Shocked by this senseless murder, he found it particularly difficult to comprehend how these children could so grievously harm a defenseless older woman.

Prosecutors sought the death penalty for Paula and one other girl. In the cloud of shock and confusion, Bill's family didn't question the recommendation. At the time, Bill thought that the death sentence was appropriate because, as long as it was the law, "his grandmother deserved that her murderers should receive death." If it could not be used for the perpetrators of his grandmother's violent and unprovoked murder, he could not imagine a situation in which it would ever be appropriate.

However, one-and-a-half years after Ruth's death, and three-and-a-half months after Paula was sentenced to death, Bill realized that the death penalty was not the right response to the murder of a woman with a tremendous faith in God. He became convinced that his grandmother would have wanted him to show more compassion, even to her murderers. In fact, Bill was so certain of this that he wrote to Paula the next day and immediately began petitioning for a sentence for Paula that he felt his grandmother would approve. After three years of campaigning and gathering the support of two million petitioners, Paula's sentence was reduced to 60 years, with an early release after 30 years for good behavior.

During her time in prison, Bill has had regular contact with Paula – he wrote to her every 10 days while she was on Death Row. Although he wanted to visit Paula immediately, he was not permitted to do so until Thanksgiving of 1994 – eight years after Ruth's murder. He described the meeting as "wonderful." "Wonderful to have been able to face Paula, and not have the hate, anger and desire for revenge that it would have been so easy to have had, but to have the kind of love and

compassion that I feel God wants us to have for all of his creation."

Bill Pelke had not given any thought to the issue of sentencing juveniles to life in prison without parole prior to the death of his grandmother. But, his experience with Paula was life-changing. He now knows that life without parole is not the answer for juvenile defendants. He has seen Paula mature over the years; she has received a GED and a college degree and wants to help others who have suffered an ordeal like hers. She has expressed her remorse to Bill in her many letters and in their meetings. Bill knows of Paula's abusive childhood and is still saddened by the fact that neither of her parents was in court on the day that she was sentenced. Bill still remembers, however, that Paula's grandfather was in court, struggling to keep his composure as his grandchild was sentenced to death.

Bill's convictions led him to co-found the Journey of Hope, an organization of families of murder victims who oppose the death penalty. Bill has written and appeared in several books and magazines and speaks in a variety of forums. In large part because of his experience with Paula, Bill strongly believes that youths can be reformed, and that, accordingly, they should be eligible for a chance at parole. While the parole decision should be on a case-by-case basis, Bill believes sentencing a youth to life without parole denies these children a first chance, let alone a second chance, at life. He feels that the key to forgiveness is compassion – compassion for those people who made mistakes and have the ability to reform. Compassion for those people who made mistakes and have the ability to reform. Bill has extended an invitation to Paula to work with him at Journey of Hope upon her release

from prison. As a result of attaining her GED and college degree, Paula will be eligible for release in July 2013, after having served 28 years and two months – and Bill will be waiting to welcome her back to the world.

Aqeela Sherrills

January 10, 2012 marked the eighth anniversary of the day Aqeela Sherrills' teenaged son, Terrell, was murdered by another teenager at a party in an upscale Los Angeles neighborhood. April 28, 2012 marks the twentieth anniversary of a historical peace treaty that Aqeela brokered between two rival Los Angeles street gangs. These two anniversaries, represent sorrow and hope; they have shaped Aqeela's views against life imprisonment for youths, even for the teenager who ruthlessly murdered his son.

Home for winter break from studying theater arts at Humboldt State University, Terrell was shot in the back by a 17-year-old while speaking to one of his friends at a party. Terrell's killer was quickly identified through the street network but not arrested. Aqeela later shocked everyone when, in addressing the nation on the "America's Most Wanted" television show, he said he did not want Terrell's teenaged killer to spend the rest of his life in prison. Rather, Aqeela wanted to meet the killer and his parents to understand him and he wanted to be sure the killer received appropriate care while carrying out his sentence. Even as he pled for the killer – a 17-year-old gang member – to turn himself in, he reiterated to the police, to family and to friends that his primary concern was getting the killer the help that he needed to heal.

Aqeela had been opposed to life without parole for juveniles even before Terrell's death. Coming of age in the Watts neighborhood of south-central Los Angeles, he began working to end gang conflict as a young man. A one-time gang member himself, Aqeela knew where these violent youth came from. "My friends and I had been living under a set of unwritten rules. Most of us hadn't really understood what we were doing. We were just following them because if we didn't, there would be consequences." These "rules" about loyalty, love and revenge caused the smallest conflict to lead to the ultimate violence – violence that should have been preventable. Aqeela knew personally that "sexual, physical or psychological abuse," affects a youth's ability to cope because he had experienced all these himself. For Aqeela, the only way to confront adolescent criminal activity is to focus on healing those wounds and changing people's attitudes about adherence to those "rules."

Aqeela knows such change can be accomplished because he has done it himself. Aqeela was the driving force behind brokering a 1992 peace treaty between the Los Angeles Bloods and Crips street gangs. From this and other similar experiences, Aqeela has seen that youth can redeem themselves.

To Aqeela, a life sentence without the possibility of parole for a 17-year-old is unjust. Aqeela recognized that his son's killer, while having committed a heinous crime, is still a person who could contribute positively to his community. "The community cannot afford to lose another child. It is imperative that we give people, especially children, a second chance and the opportunity to redeem themselves."

That the killer was a minor at the time of Terrell's murder is important to Aqeela's opposing a lifetime prison sentence for him. He knows that youthful offenders have a much greater chance of turning their lives around and breaking their destructive patterns than adults do. Acknowledging science's latest findings that the brains of young people are still developing, Aqeela realizes that youths have something else on their side that adults do not: time. They have time to heal, time to address the root causes of their destructive behavior, and time to alter the patterns that caused them to commit murder.

Aqeela does not feel that he holds these beliefs alone: "Terrell speaks through me against life imprisonment for juveniles." And Terrell's voice has guided Aqeela to becoming the Regional Director of the Resources for Human Development California ("RHDC") which focuses on preventing violence by offering classes in life management skills, mentoring, victim services and community re-entry assistance for people leaving prison, and mental and holistic health services.

B. Victims Know Youth Can Reform.

Mary Johnson

"Who did he think he was that he could take my child's life? I hated him, truly hated him." Mary Johnson recalls her feelings when she first learned that 16-year-old Marlon Green (now known as Oshea Israel) had murdered her only child, 20-year-old Laramiun Byrd, on February 12, 1993 in Minneapolis, Minnesota. Oshea, a member of a teenage gang, got into a fight with Laramiun at a

house party, pulled a gun on Laramiun, and shot and killed him.

Mary attended every court appearance relating to her son's murder, and wanted nothing less than for Oshea to be "caged up like the animal he was" for the rest of his life. She even recalls Oshea turning to look at her in the court room and smiling as if to say "Yes, I killed your son. What are you going to do about it?" Mary's anger was further fueled when the judge lowered Oshea's first-degree murder charge to second-degree murder.

Oshea was tried as an adult, and sentenced to twenty-five-and-a half years.

Searching for answers for how to heal, Mary founded "From Death to Life," an organization dedicated to ending violence through healing and reconciliation between families of victims and perpetrators. Through From Death to Life, Mary counsels parents whose children have been killed, as well as families of murderers. In Mary's view, the families of the murderers are also victims, because "hurt is hurt, it doesn't matter what side you are on." Mary soon realized that her failure to forgive was "like a cancer that eats you from the inside," and that if she wished to heal, she needed to meet her son's killer.

Mary reached out to Oshea who agreed to meet her. But when the day of the visit came, half way up the ramp to Stillwater Prison, Mary was suddenly overcome with doubt, and told her support team that she could not do it. Physically and emotionally, Mary had to be pushed up the ramp into Stillwater Prison and toward her son's killer. But by the end of the meeting, she and Oshea hugged. Overwhelmed by emotion, Mary began to fall and it was Oshea who caught her. He then said

to her, "Ma'am, I believe you're gonna be the person to help me to cry." "Yes," Mary said, "I will be that person." Moments later she thought, "I just hugged the man who murdered my son," and a heavy burden lifted from her body along with all her negative emotions. For Mary, "the anger and bitterness was over. I just knew it. I had reached the point of total forgiveness."

Oshea was released on March 7, 2009 after serving sixteen years of his sentence. It was Mary's From Death to Life organization that hosted a homecoming celebration for Oshea and his family. And it was Mary who introduced Oshea to her landlord so he could invite Oshea to move in next door to her. Now Mary and Oshea not only share a porch, but a bond so strong that Mary considers Oshea to be her "spiritual son," and Oshea sees Mary as his second mother.

Even before Oshea was released from prison, the authorities at Stillwater Prison were so intrigued by the relationship between Mary and Oshea that they asked Mary to speak to the inmates at the prison about her experiences and her views on forgiveness. Since his release from prison, Oshea now joins Mary at these speaking engagements at Stillwater Prison. They also regularly travel around the nation speaking at various functions to a wide range of audiences, including the 2011 Wisconsin Restorative Justice Conference.

It is significant to Mary that, like Laramiun, Oshea was intelligent but fell in with the wrong crowd and was involved in drug dealing. A child of divorced parents, Oshea was torn between the well-disciplined path of his mother and minister step-father, and the urge to rebel to fit in with his father's side of the family. Mary believes this inner struggle

continued even when Oshea got to prison. But once he started meeting with Mary, he started the process of accepting responsibility for his actions, and forgiving himself. And, to Mary, that is what justice should focus on – giving the offender the chance to reform. She has come to believe juvenile offenders are "...all children. What does it achieve to lock them all up for their entire lives? If they don't have a chance to reform and heal, and to show others how to learn from their mistakes, there's no hope for anybody."

Today Mary is proud – proud of Oshea for his full time job at a recycling plant by day, and proud of his pursuit of a college degree by night. Mary asserts that her forgiving him does not pardon or diminish what he did, but it helps her move forward because she believes "people can change."

Melanie Washington

Damon Dowell, age 19, and Dante Corothors, age 17, were friends. Damon had "adopted" Dante "as a little brother" even though Dante was a member of the Bloods gang. Damon was not a member of any gang but he was intrigued by what gangs stood for and wanted to help young gang members from the Bloods and the Crips. He even tried to bring them together under a truce at one point. Yet, on December 26, 1995, without warning and in an effort to prove himself to his fellow gang members, Dante shot Damon in the back two times and then shot him in the face, killing him. Dante was sentenced to life without parole.

The heartbreak of losing her son was amplified for Damon's mother, Melanie Washington. She has already experienced more than her share of

violence. Sexually molested and raped when she was still very young, she saw gang and domestic violence tear apart her family and community. Her mother and sister were murdered at the hands of her stepfather when she was 10 years old. Melanie was a victim of her first husband's abuse for three and a half years until she found out that he had murdered his own mother. Finding the strength to leave that marriage, she remarried only for it to end in the murder of her second husband by his best friend just three years after their marriage. After all that, Damon's death was a tipping point which could have broken Melanie. Instead, she resolved to try to make a difference in the community that had caused her so much pain and loss.

Melanie founded the organization Mentoring – A Touch From Above ("MATFA"), which works with jailed youth, helping them take responsibility for their actions and then re-enter the community as responsible young men. MATFA serves boys and young men ages 10 to 25 who are incarcerated in juvenile detention centers and the Department of Juvenile Justice. It also serves youth in the school districts by providing education and support in an effort to prevent them from going into the juvenile justice system in the first place and helping them to make better choices for their futures. Among the offenders that Melanie is currently counseling is Dante. Melanie, through MATFA, works with youthful offenders to assist them in understanding that there is a way to say "I'm sorry" and move their lives forward.

Melanie has helped build up MATFA so that many young lives have been turned around. Graduates of the program are working at stable jobs and attending college. MATFA "graduates" have

become an asset rather than a threat to their communities.

Melanie knows first hand how difficult the path to reconciliation and forgiveness can be on both sides. Six months after Damon's death, Melanie wrote many letters to Dante in prison, but he refused her mail. She persevered for a few months more until Dante finally reached out to Melanie to ask why she insisted on writing him. Dante eventually agreed to an in person meeting with Melanie after seven years of written correspondence when he realized that her desire to meet and forgive was genuine. Today, Melanie and Dante are still in contact.

When Damon was first killed, Melanie had not focused on the appropriateness of a particular legal sentence, other than to know that she did not believe in the death penalty. However, through her work with MATFA and her experience with youthful offenders such as Dante, she now knows that juvenile life without parole is not the right answer for many youth who are convicted. Each case requires individual consideration and review. Those youth who show remorse and the willingness to succeed in prison deserve a second chance. Melanie has come to know personally that each case and each offender is different.

Azim Khamisa

Tariq Khamisa was a 20-year-old college student at San Diego State University with a caring family, a beautiful fiancé, a bright future, and a love for life. On the night of January 21, 1995, Tariq was delivering pizzas when he was robbed, shot and killed by 14-year-old Tony Hicks. Tony, then an 8th

grader in junior high school, killed Tariq on the orders of an older gang leader, simply because the gang was hungry and had no money.

Tony pled guilty to first degree murder, and was sentenced to 25 years to life in an adult prison.

Tariq was the only son of Azim Khamisa, a former investment banker who grew up in Kenya, was educated in England and later moved to the United States. After his son's death Azim was very angry, but his anger was not directed towards his son's 14 year old killer. In fact, Azim was able to forgive Tony for killing Tariq. Azim comments that, "from the onset, I saw victims on both ends of the gun. I will mourn Tariq's death for the rest of my life. Now, however, my grief has been transformed into a powerful commitment to change. Change is urgently needed in a society where children kill children."

Determined to honor his son, and his son's love for life, Azim established the Tariq Khamisa Foundation ("TKF Foundation"), which focuses on crime prevention, stopping youth violence and developing at risk youth into productive members of the community through education, mentorship and community service programs. Shortly after the TKF Foundation was established, Azim contacted Ples Felix, Tony's grandfather and guardian, and asked him to work with him at the TKF Foundation. Azim and Ples have served together on the board of the TKF Foundation for the past 15 years.

In addition to the many other youthful offenders that Azim has met through his work with the TKF Foundation, Azim has been in regular contact with Tony, who has since passed his GED in the 94th percentile and is working toward a degree in Child Psychology. Azim has invited Tony to come

and work with him and his grandfather at the TKF Foundation upon his release from prison, to "join in the quest to prevent other kids from going down the same path." Azim believes that his experience with Tony is indicative of the potential in other young offenders, remarking that "all offenders, even the most hardened, have something of value within them. We can turn these kids around."

An investment banker turned social worker, Azim devotes his time to speaking to audiences across the United States about forgiveness, restorative justice and teaching children the principles of non-violence, and, on a day-to-day basis, works on the outreach initiatives of the TKF Foundation, which include a mentoring program with school districts throughout San Diego County, and partnerships with organizations such as the City of San Diego Commission on Gang Prevention and Intervention, and Students Against Youth Violence at San Diego State University.

Tammi Smith

Robert Sellon was the beloved, good humored half-brother of Tammi Smith who would often play good-natured pranks on Tammi and her twin sister. So when 17-year-old twin brothers David and Michael Samel brutally murdered 18-year-old Robert on October 26, 1981, just four days after Tammi's 15th birthday, she was filled with hatred.

Stoned, drunk and looking to steal marijuana and cash, David and Michael set out to rob Robert. When Robert put up a fight, the two brothers strangled him with nunchucks and beat him to death with a hammer. At his trial, Michael pled guilty to second degree murder and was sentenced to 35 to 55

years in prison. Meanwhile, David's counsel believed that because Michael had pled guilty, David would likely receive a reduced sentence. Instead, this case not only proceeded to trial on first degree murder, but also resulted in a sentence of life in prison without parole for David.

Initially, Tammi was enraged by what these boys had done to Robert, and she hoped that David and Michael would be imprisoned for the rest of their lives for their crime. She had recurring nightmares about the attack, and prior to David being transferred from pre-trial detention to permanent incarceration, Tammi visited him to express her hatred of him face-to-face, and to curse him for destroying her family. But this did nothing to provide her closure.

In 2001, Tammi realized that Michael would soon be released from prison, and that there was a key unresolved question that prevented her from achieving closure: What kind of adults had David and Michael become in prison? Tammi reached out to Michael, and the three of them started to correspond. As Tammi learned more about David and Michael, she saw that they were no longer drug-addicted, naïve teenagers, but mature adult men who felt extreme remorse over the crime committed in their youth. "David has talked about how childish he was, and he will beat himself up over it," she says. David has even expressed to her "that if he could give his life to bring her half-brother back, he would."

Michael was released in 2009, after serving 27 years, but David remains in prison. Identical twins, the same victim, yet very different outcomes.

Tammi favors and will help to seek David's release. Tammi says that "he would be a better

person out than wasting his life just sitting in prison – he could give something back." Since being in prison, David has obtained a degree in horticulture, was studying for a law degree before the program was canceled, and works in the prison hospice system.

Tammi is not only seeking David's release but also opposes all juvenile life without parole: "It is just not right to put a teenager in prison for the rest of their lives thinking they are never going to change." She says David is not the same person now as he was as a teenager, and that he should not continue to be punished for the mistakes of his youth. It is clear to her that David would never commit a similar crime again.

Tammi thinks her brother Robert, who got into trouble as a youth for drugs himself, would have wanted a second chance for David. Tammi feels society is better served by releasing youthful offenders who have sufficiently demonstrated remorse for their crimes and who have applied themselves during their time in prison. She is inspired by David's commitment to using his time in prison to educate himself. She is gratified to hear David say that, should he ever be released, he wants to help youths who have been convicted of crimes. But that will wait because, almost 30 years after being convicted for killing Robert, David is still confined to prison and faces the possibility that he will continue to pay for his crime until he dies in prison.

Robert Hoelscher

When Robert Hoelscher was seven, his father was murdered by a troubled 17-year-old who lived in

his neighborhood. Robert's mother found her husband's body on the floor of the convenience store Robert's father managed. Robert's father had partially lost his hearing while serving in World War II, so he never heard his assailant coming. He was shot in the back. The teenage killer was quickly apprehended with the murder weapon and the money he stole. He was tried and sentenced to life in prison. He remains in prison today, more than fifty years later.

Robert and his five brothers and sisters were left without a father and, in many ways, the trauma that their mother experienced took her from them too. Robert's mother, though very strong for her children in the days after the murder, spent most of the rest of her life struggling with addiction to nicotine, alcohol and pain killers. She died of cancer at the age of 57. Robert's family never discussed his father's death or the feelings that event created. Not until well into his adulthood did Robert find himself retelling the story time and time again to support a cause he came to champion.

Robert has spent a decade working in the criminal justice system and with youths specifically. His work in this area began in 2001 when he joined the Innocence Project of New Orleans as a volunteer. In only one year, Robert's hard work and dedication earned him a promotion to be the organization's first executive director. He held this position from 2002 to 2005 when he returned to Austin to work at the University of Texas. Although it is no longer his full-time job, Robert has never stopped working on behalf of innocent prisoners. He remains deeply committed to efforts to reform criminal justice in this country and continues to volunteer. Now that the issue before the Court is whether offenders under

individuals whose criminal acts were committed under the misguided influence of youth."

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

10-9647, 10-9646

FILED
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OFFICE OF THE CLEI

IN THE

Supreme Court of the United States

10-9647

KUNTRELL JACKSON,

Petitione

—v.—

(caption continued on inside cover)

BRIEF OF JEFFREY FAGAN, DEBORAH BASKIN, FRANK R. BAUMGARTNER, KATHERINE BECKETT, DONNA BISHOI ALFRED BLUMSTEIN, ROBERT BRAME, TODD R. CLEAR, SIMON A. COLE, PHILIP J. COOK, FRANCIS T. CULLEN, JOHN DILULIO, JR., KENNETH A. DODGE, JAMES ALAN FOX, DAVID GARLAND, MARIE GOTTSCHALK, DAVID A. GREEN, DAVID GREENBERG, CRAIG HANEY, BERNARD E. HARCOURT, KAREN HEIMER, DAVID S. KIRK, MARK A.R KLEIMAN, LAUREN J. KRIVO, AARON KUPCHIK, CHARIS E. KURBIN, JANET L. LAURITSEN, GLENN CARTMAN LOURY, TERRY A. MARONEY, TRACEY L. MEARES, EDWARI P. MULVEY, DANIEL NAGIN, ANDREW PAPACHRISTOS, RAYMOND PATERNOSTER, JOHN PFAFF, MICHAEL L. RADELET, RICHARD ROSENFELD, ROBERT J. SAMPSON CARLA SHEDD, SIMON I. SINGER, JONATHAN SIMON, MICHAEL TONRY, VALERIE WEST, JAMES Q. WILSON, CHRISTOPHER WINSHIP, FRANKLIN E. ZIMRING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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January 17, 2012

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ON A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

10-9646

EVAN MILLER,

Petitioner,

—v.—

ALABAMA,

Respondent.

ON A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. Background of the Notion of the Juvenile Superpredator 9

II. Scientific Evidence and Empirical Data Invalidate the Juvenile Superpredator Myth. 18

A. Arrest Rates Declined After 1994. 23

B. The Increase and Decline in Juvenile Homicides Occurred Across Demographic Groups Throughout the United States. 25

C. Juvenile Crime Rates Have Been Independent of Juvenile Population Trends. 26

D. The Behavior of the Cohort of Purported Superpredators After the Mid-1990s Was Similar to

Previous and Subsequent Generations..... 27

III. The Absence of a Generation of Superpredators Is Not Due to an Incarceration Effect or Deterrent Effect. 29

A. The Decline in Juvenile Crime Was Not Due to an Incarceration Effect. 30

B. The Decline in Juvenile Crime Was Not Due to a Deterrent Effect. 35

CONCLUSION 37

TABLE OF AUTHORITIES

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INTEREST OF *AMICI CURIAE*

Amici curiae are forty-six academics who submit this Brief in support of Petitioners Evan Miller and Kuntrell Jackson.[1] All *amici* have an interest in, teach classes on, and/or have published peer-reviewed research in the fields of criminology and/or juvenile crime trends in the United States.

Amici write in support of the Petitioners in order to bring to the Court's attention certain data and other information relating to what proved to be a short-lived increase in juvenile crime that led to changes in the treatment of juveniles (i.e. persons under the age of 18) in many states' criminal justice systems. These changes resulted in increased exposure of juvenile offenders to the possibility of sentences of life without parole.

This Court held unconstitutional the execution of juvenile offenders in *Roper v. Simmons*, 543 U.S. 551 (2005), and prohibited sentences of life without parole for juveniles convicted of non-homicide offenses in *Graham v. Florida*, 130 S. Ct. 2011, 560 U.S. ___ (2010). The Court, however, has

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[1] The parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk of the Court in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the above-mentioned *amici* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

not ruled on the issues presented in these cases, the constitutionality of sentences of life without parole for juveniles convicted of homicide offenses, including felony homicide.

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SUMMARY OF ARGUMENT

The spike in violent crime by juveniles in the late 1980s and early 1990s triggered widespread fears about the causes and extent of juvenile violence. Many states changed their laws regarding the transfer of juveniles to the adult criminal system in response to this increase in juvenile crime, subjecting juvenile offenders to sentencing regimes

that were originally conceived for adults, including sentences of life without parole.

The fears of a juvenile crime wave that prompted these changes became embodied in the notion of a "juvenile superpredator," which was reflected in academic and political discourse. Juvenile superpredators were characterized as ruthless sociopaths who lacked a moral conscience and were unconcerned about the consequences of their actions and undeterred by punishment.

However, the fear of an impending generation of superpredators proved to be unfounded. Empirical research that has analyzed the increase in violent crime during the early- to mid-1990s and its subsequent decline demonstrates that the juvenile superpredator was a myth and the predictions of future youth violence were baseless. *Amici* have been unable to identify *any* scholarly research published in the last decade that provides support for the notion of the juvenile superpredator, and the scholar credited with originating that term has acknowledged that his characterizations and predictions were wrong; he is one of the *amici* who submit this brief.

In addition, prison sentences of life without parole, whether discretionary or mandatory, have not been shown to have a deterrent effect on juvenile crime, and the incarceration rates of juveniles pursuant to such sentencing policies demonstrate no causal relationship to the significant reduction in juvenile violent crime since the mid-1990s. There is

no empirical basis for any concern that declaring unconstitutional sentences of life without parole for juvenile offenders would result in an increase in violent juvenile crime.

ARGUMENT

I. Background of the Notion of the Juvenile Superpredator

From the late 1980s to the early 1990s, homicide rates in the United States spiked, taking on the characteristics of an epidemic with a distinct onset and peak. In 1984, the homicide rate in the United States was 7.9 per 100,000 U.S. residents.[2] This rate increased to a peak of 9.8 per 100,000 in 1991.[3]

Juveniles (aged 14-17) and young adults (18-24) accounted for the entire increase in the homicide rate, as shown in Figure 1 below. The homicide rate for juveniles increased most dramatically, from approximately 10 per 100,000 in 1985 to a peak of approximately 30 per 100,000 in 1993.

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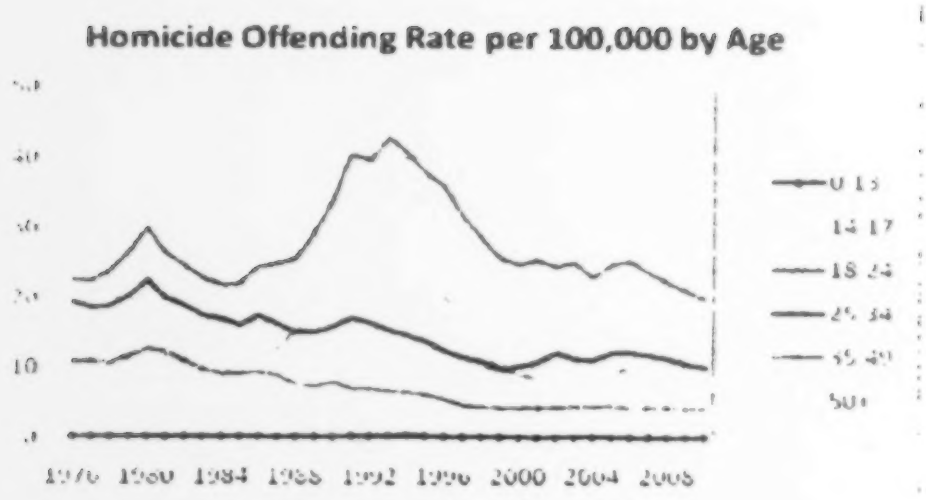
[2] Alexia Cooper & Erica L. Smith, Bureau of Just. Stat., U.S. Dep't of Just., NCJ 236018, Homicide Trends in the United States, 1980-2008 2 (2011), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2221.

[3] *Id.*

Figure 1[4]



As a result, while juveniles constituted less than 10% of all male homicide offenders in 1985, the proportion had doubled to nearly 20% by 1993, as shown in Figure 2 below.

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[4] U.S. Dep't of Just., Fiscal Years 2000–2005 Strategic Plan, Appendix D: Key Facts on Crime and Justice (2000), *available at* http://www.justice.gov/archive/mps/strategic2000_2005/tocpdf.htm. The graph in Figure 1 has been updated by Professor James Alan Fox of Northeastern University using the same Bureau of Justice Statistics to include data through 2010.

Figure 2[5]

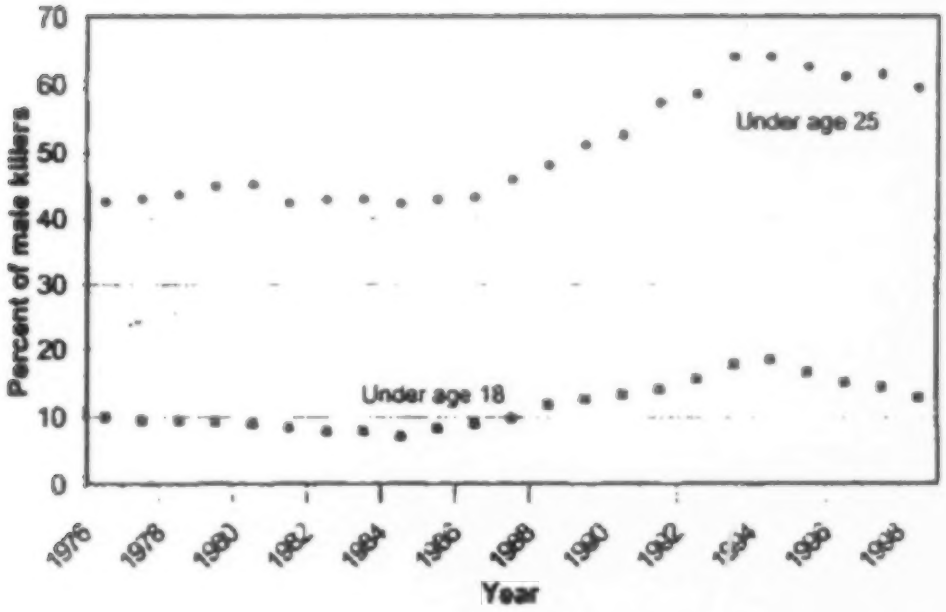

FIG. 8.—Age distribution of suspected male killers, 1976–98. Sources: ICPSR (2001a). See appendix for details.

Studies by the National Research Council and Institute of Medicine and by criminologists have attributed the growth in juvenile violence in the early 1990s to several period-specific factors, including (i) increased gang participation by youths, (ii) involvement of adolescents in violent drug dealing organizations, and (iii) a general increase in lethal violence, especially gun violence.[6] However, in

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[5] Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 Crime & Just. 1, 15 (2002).

[6] Nat'l Res. Council and Inst. of Med., Juvenile Crime, Juvenile Justice 93–94 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell, eds., 2001) (gangs); Alfred Blumstein,

response to the increase in juvenile homicide, certain social scientists and commentators argued that changes in the culture and social structure signaled a fundamental transformation in child development that corroded empathy and morality, spawning a new generation of remorseless youths who were feared to be "muggers, killers, and thieves."[7] John DiIulio, Jr., then a professor of Politics and Public Affairs at Princeton University, and one of the *amici* who are submitting this brief, is widely credited with having coined the term "superpredator" in the mid-1990s to describe these youths.[8] The term appeared in numerous articles and books written by Professor DiIulio and others during that period.[9]

Youth Guns and Violent Crime, 12 The Future of Children 39, 44–49 (2002) (drugs and guns); Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. Crim. L. & Criminology 10 (1995) (guns and drugs).

[7] William J. Bennett, John J. DiIulio, Jr., & John P. Walters, Body Count: Moral Poverty...And How To Win America's War Against Crime and Drugs 26 (Simon & Schuster 1996) (quoting James Q. Wilson, *Crime and Public Policy*, in Wilson and Petersilia, *Crime*, at 507).

[8] *See* Lara A. Bazelon, *Exploding The Superpredator Myth: Why Infancy Is The Preadolescent's Best Defense In Juvenile Court*, 75 N.Y.U. L. Rev. 159, 165 n.21 (2000).

[9] *See* John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, City Journal, Spring 1996 (referring to "super-predators"); Gene Koprowski, *The Rise of the Teen Super-Predator*, Washington Times, Oct. 23, 1996, at A17; Suzanne Fields, *The Super-Predator*, Washington Times, Oct. 17, 1996, at A23 ("The super-predator is upon us."); John DiIulio, *Defining Criminality Up*, Wall St. J., July 3, 1996, at A10

This literature described juvenile superpredators as:

> Radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders. They do not fear the stigma of arrest, the pains of imprisonment, or the pangs of conscience. They perceive hardly any relationship between doing right (or wrong) now and being rewarded (or punished) for it later. To these mean-street youngsters, the words "right" and "wrong" have no fixed moral meaning.[10]

("[The victim's] murderer exemplifies the growing threat of juvenile super-predators who maim and murder without remorse or fear."); Peter Annin, *Superpredators Arrive: Should We Cage the New Breed of Vicious Kids?*, Newsweek, Jan. 22, 1996, at 57; John J. Dilulio, Jr., *The Coming of the Super-Predators*, The Weekly Standard, Nov. 27, 1995, at 23 ("On the horizon...are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons...They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality.")

[10] Bennett et al., *supra* note 7, at 27.

In 1995, Professor DiIulio predicted that the number of juveniles in custody would increase three-fold in the coming years[11] and that, by 2010, there would be "an estimated 270,000 more young predators on the streets than in 1990."[12] Criminologist James Fox observed, "[u]nless we act today, we're going to have a bloodbath when these kids grow up."[13]

The notion of juvenile superpredators gained popularity beyond criminologists and social commentators and entered and was reified in political rhetoric.[14] "This metaphor was successful

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[11] DiIulio, *The Coming of the Super-Predators*, *supra* note 9 ("Between 1985 and 1991, the number of juveniles in custody increased from 49,000 to nearly 58,000. By my estimate, we will probably need to incarcerate at least 150,000 juvenile criminals in the years just ahead.").

[12] DiIulio, *My Black Crime Problem*, *supra* note 9.

[13] Laurie Garrett, *Murder By Teens Has Soared Since '85*, N.Y. Newsday, Feb. 18, 1995.

[14] *See e.g.*, Juvenile Justice and Delinquency Prevention Act, Hearing Before the House Comm. on Economic and Educational Opportunities, Subcommittee on Childhood, Youth and Families, 104th Cong. 90 (1996) (statement of Hon. Bill McCollum, Chairman, Subcommittee on Crime, H. Judiciary Comm.) ("[B]race yourself for the coming generation of 'super-predators.'"); Bruce Daniels, *Juvenile Justice a 'Top Priority,'* Albuquerque Journal, Oct. 8, 1996, at C3 (Senator Pete Domenici, who introduced the Juvenile Justice Modernization Act, stated one of the bill's "key principles" was to "[u]pdat[e] laws to deal with the 'superpredator,' the increasingly violent juvenile criminal") Franklin Zimring, *Crying Wolf Over Teen Demons: Crime: Projecting A New Crime Wave Serves Politicians, Even If It*

in catalyzing policymakers and the public because it readily accessed the public's hidden stereotype of the violent youth as someone who is dangerous, living in a hopeless situation, and not worthy of empathy or support."[15]

Throughout the 1990s, state legislatures took action in an environment of hysteria featuring highly publicized heinous crimes committed by juvenile offenders, which created "a looming sense of danger that a 'superpredator' youthful offender is at large."[16] Between 1992 and 1999, nearly every state passed legislation that expanded the treatment of juveniles as adults for purposes of sentencing and punishment:[17]

Has No Basis In Reality, Los Angeles Times, Aug. 19, 1996, at 5 ("Bob Dole injected both the term 'superpredators' and alarming projections about 2010 into the presidential campaign.").

[15] Kenneth A. Dodge, *Framing Public Policy and Prevention of Chronic Violence in American Youth*, 63 Am. Psychologist, 573, 576 (2008).

[16] Jarod K. Hofacket, *Justice or Vengeance: How Young is Too Young for a Child to Be Tried and Punished as an Adult?*, 34 Tex. Tech. L. Rev. 159, 164 (2002).

[17] *See* Jessica Short & Christy Sharp, Child Welfare League of Am., Disproportionate Minority Contact in the Juvenile Justice System 7 (2005), *available at* https://www.ncjrs.gov/App/publications/Abstract.aspx?id=235885 ("Between 1992 and 1999, 49 states and the District of Columbia passed laws making it easier for juveniles to be tried as adults through statutory exclusion, mandatory waiver, direct file by prosecutors, or presumptive waiver legislation.").

- Between 1992 and 1995, forty-eight states and the District of Columbia made substantive changes to their laws affecting juveniles who committed violent or serious crimes.[18]

- Between 1992 and 1995, legislatures in thirteen states and the District of Columbia adopted or modified statutes that imposed mandatory minimum periods of incarceration for juveniles convicted of certain violent or serious crimes.[19]

- Between 1992 and 1997, forty-five states adopted or modified laws that facilitated the prosecution of juveniles as adults in criminal court.[20]

- By 1999, the majority of states had adopted provisions imposing mandatory transfer of juvenile cases to adult criminal proceedings for certain serious offenses.[21] These changes

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[18] Patricia Torbet, et al., Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., State Responses to Serious and Violent Juvenile Crime xv (1996), *available at* www.ncjrs.gov/pdffiles/statresp.pdf.

[19] *Id.*

[20] *See* Howard N. Snyder & Melissa Sickmund, Nat'l Center for Juv. Just., U.S. Dep't of Just., Juvenile Offenders and Victims: 2006 National Report 96 (2006), *available at* http://www.ojjdp.gov/ojstatbb/nr2006/.

[21] *See* Barry C. Feld, *A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole*, 22 Notre Dame J. L. Ethics & Pub. Pol'y 9, 13 (2008).

included lowering the age of eligibility for prosecution and sentencing in criminal court to 13 years in New York, and as young as 10 elsewhere.[22]

In addition, numerous bills were introduced in Congress to address juvenile crime, including one named the Violent Youth Predator Act of 1996.[23] Although the proposed federal legislation was not adopted, the state laws enacted during the 1990s

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[22] *See* Patricia Griffin, Patricia Torbet, & Linda Szymanski, Nat'l Center for Juv. Just., U.S. Dep't of Just., NCJ 1072836, Trying Juveniles in Criminal Court: An Analysis of State Transfer Provisions, 14-15 (1998), *available at* http://www.ncjrs.gov/pdffiles/172836.pdf (table listing the minimum age and offense for which a juvenile can be transferred to criminal court in every state as of 1997); *see also* Snyder & Sickmund, *supra* 20, at 114 (updated figure with minimum transfer age as of 2004).

[23] *See e.g.*, Juvenile Justice and Delinquency Prevention Act of 1996, S. 1952, 104th Cong. (1996); Anti-Gang and Youth Violence Control Act of 1996, S. 1991, 104th Cong. (1996); Violent and Repeat Juvenile Offender Reform Act of 1996, S. 1854, 104th Cong. (1996); Balanced Juvenile Justice and Crime Prevention Act of 1996, H.R. 3445, 104th Cong. (1996); Violent and Hard-Core Juvenile Offender Reform Act of 1996, H.R. 3494, 104th Cong. (1996); Violent Youth Predator Act of 1996, H.R. 3565, 104th Cong. (1996); Anti-Gang and Youth Violence Control Act of 1996, H.R. 3698, 104th Cong. (1996); Juvenile Crime Control and Delinquency Prevention Act of 1996, H.R. 3876 104th Cong. (1996); Juvenile Crime Prevention and Reform Act of 1995, S. 1036, 104th Cong. (1995); Violent and Hard-Core Juvenile Offender Reform Act of 1995, S. 1245, 104th Cong. (1995).

greatly expanded the imposition on juveniles of punishments previously reserved for adults.[24]

II. Scientific Evidence and Empirical Data Invalidate the Juvenile Superpredator Myth.

The prediction of a juvenile superpredator epidemic turned out to be wrong; in fact, there was no superpredator generation. [25] Professor DiIulio,

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[24] During the same era, zero-tolerance policies were implemented in many public schools, pursuant to which the first offense for weapon-carrying and other infractions was met with immediate expulsion from schools. No scientific evidence has found that zero-tolerance policies or school suspension policies lead to decreases in youth violence. *See* Russell J. Skiba, *Zero Tolerance, Zero Evidence: An Analysis of School Disciplinary Practice* Policy Research Report #SRS2 August, 2000. Other effects of the superpredator myth included the largest expansion in history in the U.S. prison population, which increased by more than one million between 1980 and 2000. *See* Sarah Lawrence & Jeremy Travis, *The New Landscape of Imprisonment: Mapping America's Prison Expansion* 1 Research Report of the Urban Institute, Washington D.C. (2004).

[25] The methodologies used in predicting the coming of a generation of superpredators have been criticized. *See generally* James C. Howell, Preventing and Reducing Juvenile Delinquency: A Comprehensive Framework 3–16 (2d ed. 2009); Franklin E. Zimring, American Youth Violence, 61–63 (Oxford University Press 1998); Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L. Rev. 727, 728 (1998) (challenging predictions of a "coming storm" of juvenile superpredators as distortion of statistics and "fundamentally unscientific" guesswork); *see also* Franklin E. Zimring, American Youth Violence (critiquing the use of a temporal spike in youth violence to predict future trends).

the original proponent of the juvenile superpredator notion and a signatory to this brief, has repudiated the idea and "expressed regret, acknowledging that the prediction was never fulfilled."[26]

Although the myth of a juvenile superpredator influenced legislation and policy, it was not substantiated by scientific evidence about how children develop. The popular myth suggested that all chronically antisocial youths were hopelessly defective—perhaps even genetically so. Molecular genetic studies, though, have revealed that genes account for very little of the variation in violent behavior, except when interacting with

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[26] Professor DiIulio has noted that the explicit conclusion of his original analysis even at the time was that "[l]ong prison terms would not deter" the most violent juveniles, and that the proper remedy was more faith-based anti-crime efforts (i.e. "build churches, not jails") as the best solution. *See* John J. DiIulio, Jr., *Rethinking Crime—Again*, Democracy Journal, Spring 2010, at 46, 52–53; *see also* Rachel Aviv, *Annals of Justice: No Remorse: Should a Teen-Ager Be Given a Life Sentence?*, The New Yorker, Jan. 2, 2012, at 57; *see also* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19. Professor James Fox, who urged that Professor DiIulio's predictions should drive changes in sentencing laws, also has repudiated the notion of the superprdeator and is a signatory to this brief. *See* James Alan Fox, *A Too-Harsh Law on Juvenile Murder*, The Boston Globe, Jan. 25, 2007, at A11 ("It's time to rethink our rigid juvenile murder law...").

environmental experiences such as physical maltreatment.[27]

Another aspect of the juvenile superpredator myth was the belief that antisocial youths prowl in "wolfpacks" and the superpredator exercises a contagious influence on unsuspecting peers, with the implication that he should be quarantined for life. However, a study of juvenile gang members shows that, when juvenile gang members are compared to non-gang member juveniles, gang members only have higher rates of delinquent behavior while they are gang members; juvenile gang members did not have higher rates of delinquent behavior before entering a gang or after they left a gang.[28] Also embedded in the juvenile superpredator notion was the belief that the antisocial youth who sets out on a

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[27] Avshalom Caspi, et al., *Role of Genotype in the Cycle of Violence in Maltreated Children*. 297 Sci. 851 (2002).

[28] Terence P. Thornberry, et al., *The Role of Juvenile Gangs in Facilitating Delinquent Behavior*, 30 Crime and Delinq. 55–87 (1993) (noting that juveniles' rates of delinquent behavior increased substantially upon entering a gang and then declined significantly once they left a gang). Data do show that juveniles tend, when around peers, to act in ways that differ from how they would act alone. *See* Jason Chien, Dustin Albert, Lia O'Brien, Kaitlyn Uckert & Laurence Steinberg, *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 Developmental Sci. F1 (March 2011). The data do not, however, show that the presence of individual, highly deviant youth in those peer groups results in juveniles having higher rates of delinquent behavior even after leaving that group.

deviant path cannot change. Yet research has shown that most antisocial youths outgrow their deviant behavior through the support of specific environmental impacts such as marriage and employment.[29] Randomized controlled trials of systematic interventions for high-risk youths have also demonstrated conclusively that the trajectory of antisocial development can be interrupted.[30]

Moreover, empirical data analyzing crime and arrest rates also show that the juvenile superpredator was a myth. Beginning in the mid-1990s, violent juvenile crime dropped and continued to decrease through the present. The rate at which juveniles committed homicides fell dramatically, so

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[29] *See* Magda Stouthamer-Loeber et al., *Desistance From Persistent Serious Delinquency in the Transition to Adulthood* 16 Development and Psychopathology 891 (2004); *see also* Robert J. Sampson & John H. Laub, *Life-Course Desisters? Trajectories of Crime Among Delinquent Boys Followed to Age 70*, 41 Criminology 301, 334 (2003) (concluding that there are important differences in adult criminal trajectories that cannot be predicted from childhood); Robert J. Sampson & John H. Laub, *Crime and Deviance over the Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609, 625 (1990) (showing both incremental and abrupt change in delinquent behavior when youths are exposed to conventional social activities of stable employment and marriage).

[30] *See* Conduct Problems Research Prevention Group, *The Effects of the Fast Track Preventive Intervention on the Development of Conduct Disorder Across Childhood*, 82 Child Dev. 331 (2011); Scott W. Henggeler et al., Multisystemic Treatment of Antisocial Behavior in Children and Adolescents (1998).

that by 2000, the rate had stabilized at around 9.5 per 100,000, below the 1985 level, as shown in Figure 3.[31] Similarly, the average age of homicide offenders, which had dropped from 29.6 years in 1980 to 26.4 years in 1994, rose to 28.8 years in 2008.[32] According to the National Crime Victimization Survey[33] data, after the mid-1990s, the rate of all serious violent juvenile offending, including homicide, as of the mid-1990s was comparable to that of the prior generation.[34]

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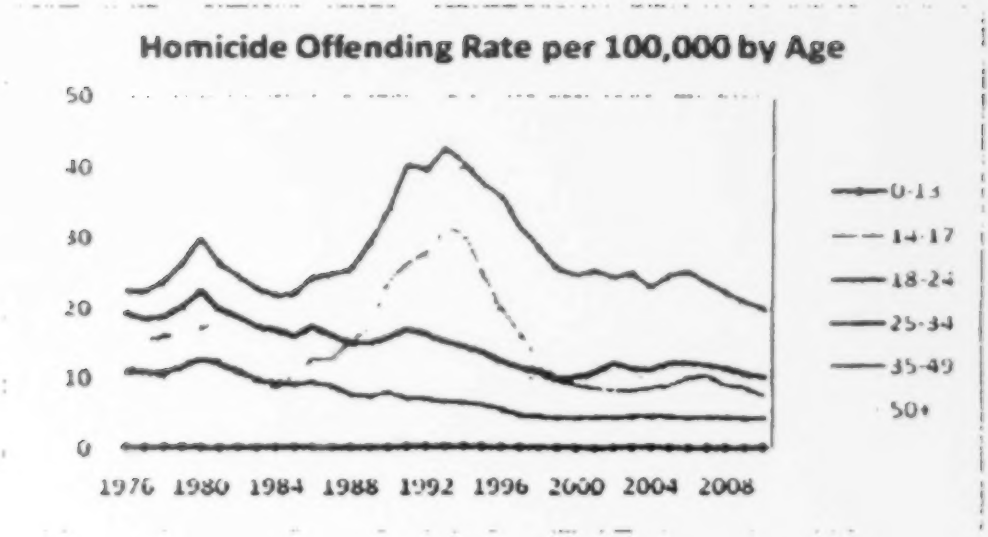
[31] Cooper & Smith, *supra* note 2, at 4.

[32] *Id.* at 5.

[33] NCVS data is collected directly from victims, which means it captures a greater percentage of offending behavior than can be found in police reports; however, it relies on victims to assess the age of offenders. *See* James P. Lynch, Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., NCJ 191052, Trends in Juvenile Violent Offending: An Analysis of Victim Survey Data 3 (2002), *available at* www.ncjrs.gov/pdffiles1/ojjdp/191052.pdf.

[34] Shay Bilchik, Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., NCJ 178993, Challenging the Myths 2 (2000), *available at* www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf.

Figure 3[35]



A. Arrest Rates Declined After 1994.

The decrease in juvenile violent crime rates was accompanied by a similar drop in juvenile arrest rates.[36] The number of juveniles arrested for violent crimes, which had increased significantly during the late 1980s and early 1990s, fell by nearly 50% between 1994 and 2009 to its lowest levels since

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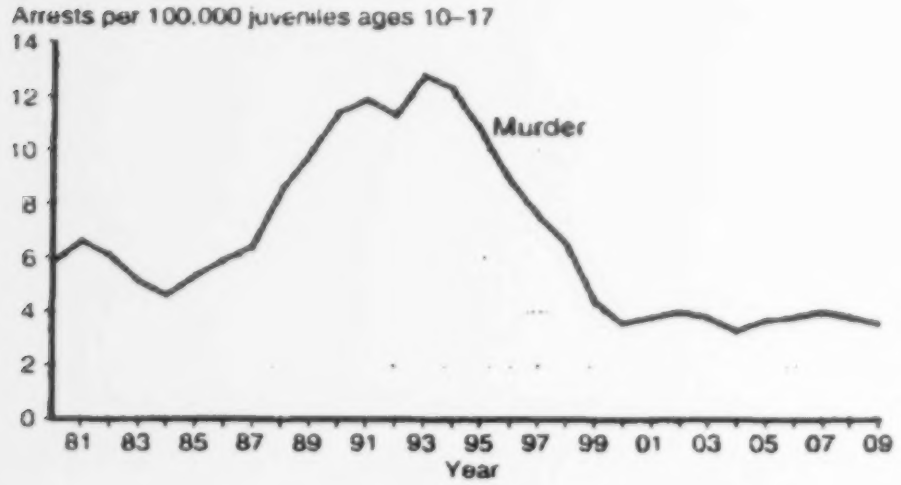
[35] Cooper & Smith, *supra* note 2, at 4. This graph has been updated by Professor James Alan Fox of Northeastern University using the same Bureau of Justice Statistics to include data through 2010.

[36] Arrest rates generally produce low estimates of offending because many crimes are not reported and many crimes remain unsolved. Furthermore, to the extent that race or gender affect the probability of being arrested, certain groups may be over- or underrepresented. *See* Lynch, *supra* note 33, at 3.

1980.[37] The juvenile arrest rate for murder declined even more dramatically, as shown in Figure 4. Indeed, between just 1992 and 1995 more juveniles were arrested for murder than in the ten years from 2000 through 2009, a period during which the arrest rate remained stable and historically low.[38]

Figure 4[39]



The temporary increase in the early 1990s and subsequent decrease since the mid-1990s in juvenile

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[37] *See* Charles Puzzanchera & Benjamin Adams, Off. of Juv. Just. and Delinq. Prevention, U.S. Dep't of Just., NCJ 191052, Juvenile Arrests 2009 8 (2011), *available at* www.ojjdp.gov/pubs/236477.pdf.

[38] *Id.* at 9.

[39] *Id.* at 8

arrests for violent crimes was consistent with the trends for all age groups.[40]

B. The Increase and Decline in Juvenile Homicides Occurred Across Demographic Groups Throughout the United States.

The increase and subsequent decline in juvenile homicides was not specific to any demographic group. The homicide arrest rate for both white and black teenagers peaked in 1994 and then fell through the year 2000.[41] In addition, homicide arrest rates for both males and females have dropped over 65% from their respective peaks in the mid-1990s and are now below the levels of the early 1980s.[42]

The rise and fall of homicide rates took place nationwide. For example, the fifteen counties (located across the country) with the highest homicide rates for African-American teenagers and young adults in the mid-1980s all experienced a sharp increase in homicide rates for this group by

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[40] Bilchik, *supra* note 34, at 3.

[41] Puzzanchera & Adams, *supra* note 37, at 9. Juvenile arrest rates for all violent crimes similarly increased significantly across racial groups in the late 1980s and early 1990s and then experienced a decline of over 40% by 2009. *Id.* at 8.

[42] *Id.*

the early 1990s; most of these counties experienced declines in homicide rates by 1998.[43]

C. Juvenile Crime Rates Have Been Independent of Juvenile Population Trends.

The above-described trends in juvenile violent crime occurred independently of the changes in the overall juvenile population. Changes in the size and racial composition of the juvenile population were an essential argument in the juvenile superpredator forecasts.[44] Despite a growth in the number of youths, the juvenile violent crime rate has declined since the mid-1990s. The juvenile crime rates and arrest rates increased from 1987 to 1994, a period of slow juvenile population growth; yet, when the juvenile population increased significantly between 1994 and 1997, crime and arrests declined,[45] providing further empirical support that a generation of juvenile superpredators did not exist. Moreover, the share of the nationwide juvenile population confined in correctional custody declined by 24 percent between 1997 and 2007, from 256 of

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[43] Cook & Laub, *supra* note 5, at 18. Counties examined in this study were located in the following geographically diverse states: New York, California, Michigan, Maryland, Pennsylvania, Louisiana, Texas, Missouri, Florida, Georgia, Tennessee, Ohio, as well as the District of Columbia.

[44] *See* Howell, *supra* 26, at 5.

[45] Bilchik, *supra* note 34, at 6.

every 100,000 to 194 out of 100,000.[46] Similarly, the number of new admissions of juveniles to state prisons, which had peaked at over 7,000 in 1996, decreased to just over 4,000 by 2004[47] and has further shrunk since then.[48]

D. The Behavior of the Cohort of Purported Superpredators After the Mid-1990s Was Similar to Previous and Subsequent Generations.

Data show not only that juvenile violent crime rates declined, but also that the purported generation of juvenile superpredators behaved similarly to the generations that preceded and followed it.[49]

To assess the behavior of this cohort, researchers have compared the victimization rates of persons who were juveniles in the early 1990s to those who were juveniles before and after that

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[46] Richard A. Mendel, Annie E. Casey Foundation, No Place for Kids: The Case for Reducing Juvenile Incarceration 26 (2011), *available at* http://www.aecf.org/OurWork/JuvenileJustice/~/media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf.

[47] Snyder & Sickmund, *supra* note 20, at 237.

[48] *See* Heather C. West & William J. Sabol, Bureau of Just. Stat., U.S. Dep't of Just., NCJ 225619, Prison Inmates at Midyear 2008- Statistical Tables 20 (2009), *available at* bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf.

[49] Cook & Laub, *supra* note 5, at 21.

period.[50] In particular, the homicide-victimization rates of black males born in 1969, 1974, 1977, and 1981 were compared to the victimization rate for the same age groups prior to the period of increased crime.[51] As shown in Figure 5, this analysis reveals that each group experienced elevated victimization rates during the era of higher juvenile crime, but that by 1998 the rate for each group decreased to the lower levels previously experienced by those born in 1969.

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[50] *Id.* at 24. Victimization rates were used because they have been highly correlated with offender rates.

[51] *Id.*

Figure 5[52]

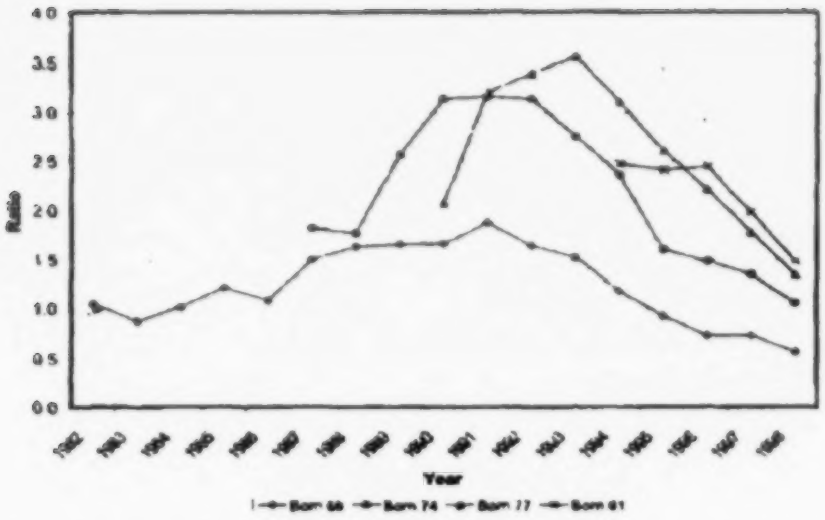

FIG. 10. - Ratio of homicide victimization rates to pre-epidemic base rate (1976–84), four birth cohorts of black males. Sources: ICPSR (2001a–f); CDC (2001a, c). See appendix for details.

III. The Absence of a Generation of Superpredators Is Not Due to an Incarceration Effect or Deterrent Effect.

The fear of a generation of superpredators has not been borne out, but the laws that were passed in the wake of the increase in temporary juvenile crime that led to the rise of the juvenile superpredator myth continue to exist. Any argument that the harsher criminal penalties for juveniles deterred or incarcerated these purported superpredators is unpersuasive in light of the available research data.

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[52] *Id.* at 25.

A. The Decline in Juvenile Crime Was Not Due to an Incarceration Effect.

Empirical studies show that the legislative changes undertaken by certain states were not causally responsible for the decline in juvenile homicide rates. While the decline in juvenile crime occurred on a national scale, those states with the greatest decrease in juvenile confinement rates between 1997 and 2007 saw a slightly greater decline in juvenile violent crime rates than the national average.[53] There were no differences in states with and without statutes authorizing sentences of life without parole for juveniles, or in states that transferred everyone over the age of sixteen to the jurisdiction of criminal court versus those states that transferred youths more selectively. For example, between 1997 and 2007, Texas greatly increased its incarcerated juvenile population while California decreased its incarcerated juvenile population, yet the rates of juvenile crime in both states were remarkably similar.[54] In 2007, changes in Texas laws cut its incarcerated juvenile population by half.[55] Neither the state's overall crime rate nor the number of juvenile arrests has since increased.[56]

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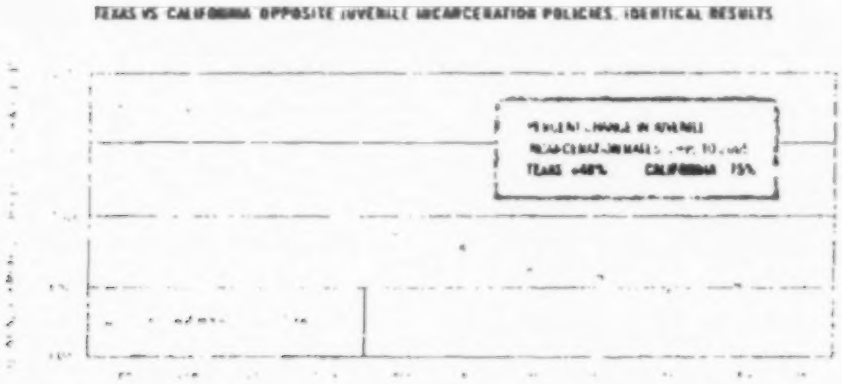
[53] Mendel, *supra* note 46, at 26.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 27.

Figure 6[57]



Similarly, a study of the effects of New York's Juvenile Offender Law on the rate of serious juvenile crime found minimal impact. New York's legislation, which was enacted in 1978, lowered the age of criminal court jurisdiction to thirteen for murder and to fourteen for rape, robbery, assault, and violent categories of burglary. The study analyzed juvenile arrest rates in New York for the four years prior to the enactment of the law and the six years after. It compared these rates with those for control groups of thirteen- and fourteen-year-olds in Philadelphia and with slightly older offenders in New York.[58] The study found that the change in law

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[57] *Id.*

[58] David McDowall & Simon I. Singer, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*. 22 Law and Soc'y Rev. 521 (1988). While arrest rates are an imperfect measurement of crime rates, they are nonetheless a strong indicator of crime rates. *See id.* at 528. ("The advantage of the arrest data is that they provide age-specific information on crime patterns. . .

had no effect on the levels of serious juvenile crime.[59] A study of the deterrent effect of an Idaho statute enacted in 1981, which required that juveniles charged with certain serious crimes be tried as adults, also found no impact on the arrest rates between five years before and five years after the passage of the law.[60]

The rate at which juveniles were incarcerated for life without the possibility of parole in different states bore no correlation to the rise and fall in juvenile homicide rates during the late 1980s and early 1990s, which was consistent across the states,

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Time series designs can tolerate some measurement bias, as long as this bias does not itself change at the intervention point."); *see also* McGowan, et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System*, 32 Am. J. Prev. Med. S7, S19 (2007) ("Nevertheless, arrest rates are among the best available and most commonly used indicators of crime, and thus the best available outcome for assessment in this review.").

[59] McDowall & Singer, *supra* note 58.

[60] Eric L. Jensen and Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 Crime and Delinq. 96 (1994); *see also* James Alan Fox, *Abolish life without parole in Mass.*, Boston.Com, Sept. 21, 2011, *available at* http://boston.com/community/blogs/crime_punishment/2011/09/abolish_juvenile_life_without_p.htm (analysis of the 1996 Massachusetts statute that made life without parole mandatory for all juveniles 14 and older convicted of first degree murder showing no subsequent impact on juvenile homicide rates).

including Alabama and Arkansas. States with large numbers of juveniles incarcerated for life without parole did not see their homicide offense rates decline sooner, faster, or to lower levels than did the states without significant numbers of juveniles sentenced to life without parole.[61] Pennsylvania and Michigan, with relatively higher proportions of juveniles serving sentences of life without parole, experienced trends similar to the rest of the country, as seen in Figures 7 and 8.

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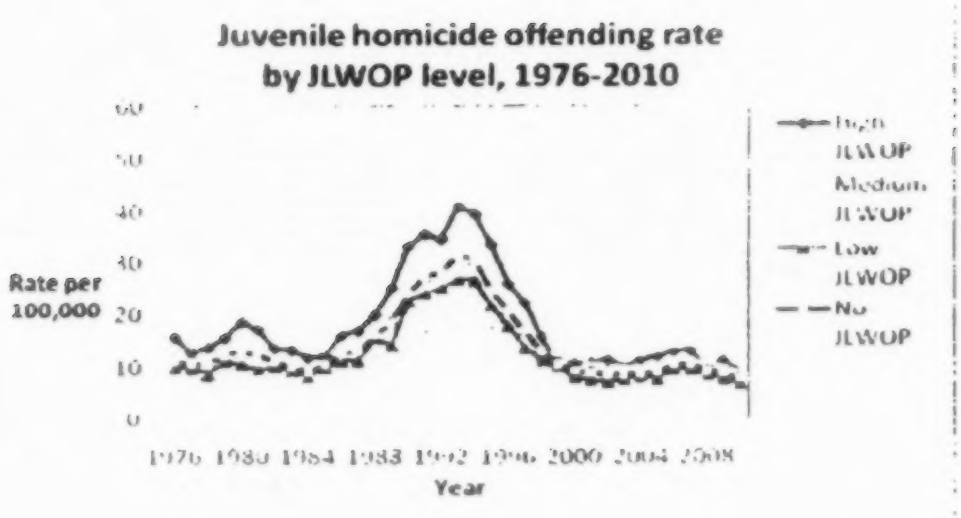
[61] "High JLWOP" is defined as more than 50 persons serving a juvenile life without parole sentence, "medium JLWOP" is defined as 25–49 persons serving a juvenile life without parole sentence, "low JLWOP" is defined as fewer than 25 persons serving a juvenile life without parole sentence, and "no JLWOP" means no person is serving a juvenile life without parole sentence. These categories were defined by Professor James Alan Fox.

Figure 7[62]



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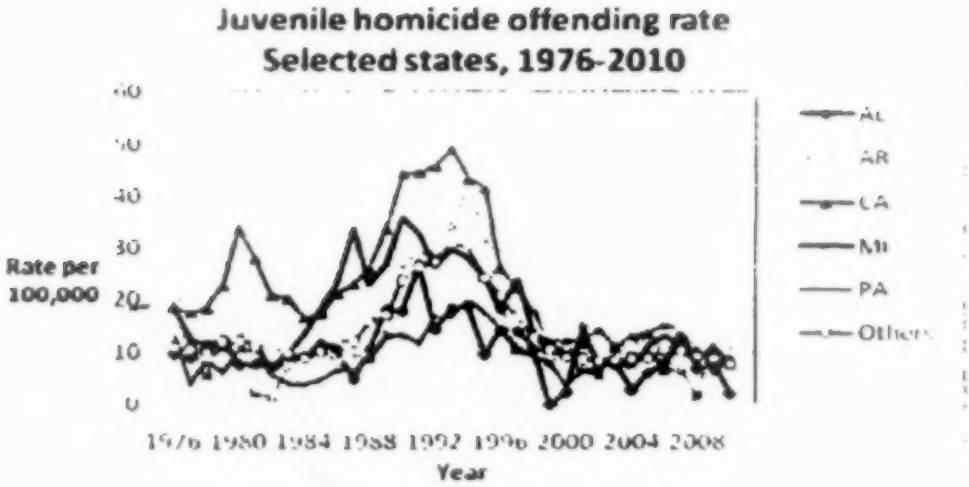
[62] Source of data: Juvenile homicide counts represent the estimated number of homicide perpetrators, ages 14–17, based on the Supplementary Homicide Reports with multiple imputation for missing data and therefore represent estimates. Population data are from the U.S. Bureau of the Census estimates of resident population by state, age, race, and sex. These data were then converted into Figures 7 and 8 by Professor James Fox at Northeastern University.

Figure 8



B. The Decline in Juvenile Crime Was Not Due to a Deterrent Effect.

The fact that juvenile homicide rates were not affected by the rate at which states imposed sentences of life without parole on juveniles is not surprising given that research shows that transferring juveniles to the jurisdiction of criminal courts or lowering the age of majority has no discernable deterrent effect.[63] Juveniles experience no spike in crime rate once they turn eighteen, and increased criminal sanctions have no significant correlation with this result.[64] In fact, there is little

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[63] David S. Lee & Justin McCrary, *Crime Punishment, and Myopia*, 29 (NBER Working Paper Series, Working Paper 11491, June 2005).

[64] *Id.*; *see* McGowan, *supra* note 58, at S15 ("On the basis of strong evidence that juveniles transferred to the adult

evidence that the prospect of longer sentences has a significant deterrent effect on adolescents.[65] It thus appears that legal changes that increased the rate at which juveniles were transferred to the regular criminal court system did not contribute to the decline of the juvenile homicide rate.

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justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system, the Task Force on Community Preventive Services concludes that strengthened transfer policies are harmful for those juveniles who experience transfer."); *see also* Jeffrey Fagan, Aaron Kupchik, & Akiva Liberman, *Be Careful What you Wish For: Legal Sanctions and Public Safety Among Adolescent Offenders in Juvenile and Criminal Court*, Columbia Law School, Pub. Law Research Paper No. 03-61, 69 (July 2007) (finding that "transfer to criminal court actually may increase the risk of violent and other serious crime by adolescents and young adults increasing public safety risks for citizens while heavily mortgaging the possibility of reformation or prosocial development for many transferred offenders."), *available at* http://ssrn.com/abstract=491202.

[65] *See* Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 Criminology & Pub. Pol'y 8 (2011) (showing that for both adolescents and young adults an increase in the risk of arrest has a greater deterrent effect than the threat of longer prison sentences); *see also* Thomas A. Loughran et al., *Estimating A Dose-Response Relationship Between Length of Stay and Future Recidivism in Serious Juvenile Offenders*, 47 *Criminology* 699 (2009) (showing that there is no effect from incarceration, on future rates of rearrest or self-reported offending for serious juvenile offenders, and that there is no marginal effect for lengthier stays).

CONCLUSION

Extensive research data demonstrate that the notion of a generation of juvenile superpredators, which sought to explain the spike in juvenile crime in the late 1980s and early 1990s, and the predictions by the proponents of the juvenile superpredator myth that juvenile violent crime would continue to increase sharply, were wrong. Instead, juvenile crime rates have dropped significantly across demographic groups throughout the United States since the mid-1990s. The spike in juvenile violence in the early 1990s was a manifestation of an epidemic and not a lasting change in the social, psychological, cultural, or even genetic makeup of American youth. Yet the superpredator myth contributed to the dismantling of transfer restrictions, the lowering of the minimum age for adult prosecution of children, and it threw thousands of children into an ill-suited and excessive punishment regime.

This legislation has been shown to have had no material effect on the subsequent decrease in crime rates. Indeed, states have experienced similar declines in juvenile violent crime rates since the mid-1990s, irrespective of whether their laws provided for prison sentences of life without parole for juvenile offenders. Thus, there is no empirical basis for any concern that applying the reasoning of *Roper* and *Graham* to bar the imposition of sentences of life without the possibility of parole on juveniles would result in an increase in violent juvenile crime.

Amici therefore urge that the Court reverse the judgments in the courts below.

Respectfully submitted,

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January 17, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

FILED
JAN 17 2012
OFFICE OF THE CLERK

Nos. 10-9646 & 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER,
Petitioner,
v.
ALABAMA,
Respondent.

KUNTRELL JACKSON,
Petitioner,
v.
RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,
Respondent.

On Writs of Certiorari to the Alabama Court of Criminal Appeals and the Arkansas Supreme Court

BRIEF OF FORMER JUVENILE COURT JUDGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. JUVENILE HOMICIDE OFFENDERS, LIKE OTHER SERIOUS JUVENILE OFFENDERS, ARE CATEGORICALLY DIFFERENT FROM ADULT OFFENDERS 6

II. THESE CASES ILLUSTRATE THE EXTENT TO WHICH THE DISTINGUISHING CHARACTERISTICS OF YOUTH CAN CONTRIBUTE TO JUVENILE CRIMINALITY, INCLUDING HOMICIDE 9

III. JUVENILE HOMICIDE OFFENDERS, LIKE OTHER SERIOUS JUVENILE OFFENDERS, ARE CAPABLE OF REHABILITATION 13

A. Juvenile Homicide Offenders Are Capable of Rehabilitation If Provided the Right Opportunities 14

B. It Is Impossible To Predict at Sentencing How a Juvenile Will Change Over Time 17

IV. A LIFE WITHOUT PAROLE SENTENCE SIGNIFICANTLY LIMITS A JUVENILE'S ABILITY TO REFORM AND CHANGE 20

A. Sentencing Juveniles to Life Without Parole Denies Them Hope and the Incentives To Try To Reform 20

TABLE OF CONTENTS

Page

B. Sentencing Juveniles to Life Without Parole Denies Them Opportunities To Participate In Educational and Rehabilitation Programs 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

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Eddings v. Oklahoma,
455 U.S. 104 (1982) 7, 8

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105 Nev. 525 (1989) 18, 19, 20

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131 S. Ct. 1229 (2011) 17

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543 U.S. 551 (2005) ..... passim

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INTEREST OF *AMICI CURIAE*

This brief is submitted on behalf of a group of former juvenile court judges as *amici curiae* in support of petitioners in both *Miller v. Alabama*, No. 10-9646, and *Jackson v. Hobbs*, No. 10-9647.[1] Because of their experiences as juvenile court judges, *amici* are familiar with the impressionability and immaturity that generally characterize juvenile offenders, as well as their ability to grow and change over time.

Amici believe that sentencing juveniles, even those who commit homicide offenses, to life without parole ignores the substantial differences between juvenile and adult offenders and meaningfully hampers the ability of these young people, who are uniquely capable of maturation, growth, and change, to rehabilitate and reform.

Having spent decades overseeing the cases of juvenile offenders and thus having witnessed firsthand their remarkable resilience, *amici* strongly believe that the criminal justice system cannot predict what kind of person a fifteen-year-old juvenile offender will be when he is 35, or 55, or 75. Rather, there should be some meaningful opportunity for the system to reassess whether incarceration remains necessary for these offenders after they have had the opportunity to grow, mature, and change.

---

[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

Individual *amici* are as follows:

• Judge Susan E. Block (ret.) served as Administrative Judge of the Family Court of St. Louis County in Missouri from 2000-2004, after three years as the Juvenile Judge. After her retirement in 2004, she joined Paule Camazine & Blumenthal as a principal where she specializes in complex family law matters.

• Judge Michael A. Corriero (ret.) served as a judge in the criminal courts of New York State for twenty-eight years. In the last fifteen years of his tenure, he presided over Manhattan's Youth Part, a special court established within the adult criminal court system where he was responsible for resolving the cases of thirteen-, fourteen-, and fifteen-year-olds who were charged with serious offenses and who were tried as adults pursuant to New York's Juvenile Offender Law. Judge Corriero is the Founder and Executive Director of the New York Center for Juvenile Justice.

• Judge Margaret S. Fearey (ret.) served as an Associate Justice in the Juvenile Court Department of the Trial Court of the Commonwealth of Massachusetts from 1996 until January 2012. In that capacity, she heard and decided numerous felony cases involving juveniles, including those involving adult sentencing options.

• Judge Gail Garinger (ret.) served as an Associate Justice in the Juvenile Court Department of the Massachusetts Trial Court from 1995-2001 and as the First Justice of the Middlesex County Division of the Juvenile Court Department from 2001-2008. From 2008 to the present, she has served as The Child Advocate for the Commonwealth of Massachu-

setts.

• Judge Martha P. Grace (ret.) served as Chief Justice of the Massachusetts Juvenile Court from 1998-2009 and as a Massachusetts Juvenile Court Judge for Worcester County from 1990-1998.

• Judge Julian Houston (ret.) served as Presiding Justice of the Juvenile Session of the Roxbury (Massachusetts) District Court from 1979-1990 before being appointed to the Massachusetts Superior Court.

• Judge Gordon Martin (ret.) served as a judge of the Massachusetts Trial Court from 1983-2004 where he heard both juvenile and adult cases. He was previously a Trial Attorney in the Civil Rights Division of the U.S. Department of Justice and First Assistant U.S. Attorney for the District of Massachusetts.

• Judge Chuck McGee (ret.) served for over thirty years as a Nevada judge whose duties always included a juvenile law calendar. He was twice made Chief Judge and was President of the District Judges Association. He has a Masters Degree in Juvenile Law from the Judicial College at the University of Nevada, Reno; his thesis was on a balanced approach to Juvenile Justice.

• Judge Lillian Miranda (ret.) served as First Justice of the Franklin-Hampshire Juvenile Court in Massachusetts from 1994-2011. Previously, she was Staff Counsel/Executive Director of Hampshire County Bar Advocates, where she was responsible for overseeing the assignment, training, and monitoring of private counsel who provided legal assistance to indigent adult and juvenile offenders

charged with crimes carrying a potential jail sentence or commitment to juvenile detention.

• Judge H. Ted Rubin (ret.) served as a judge on the Denver Juvenile Court for six years and then spent twenty-two years as Director for Juvenile Justice for the Institute for Court Management, National Center for State Courts. He has also served as a private consultant for juvenile courts and is the author of six books on juvenile justice, including *Juvenile Justice: Policies, Practices, and Programs*.

• Judge Irene Sullivan (ret.) retired last year after nine years as a juvenile judge, handling abuse, neglect, and delinquency cases in Pinellas County, Florida. She teaches juvenile law at Stetson University College of Law, is the author of *Raised by the Courts: One Judge's Insight into Juvenile Justice*, and speaks around the country on juvenile justice issues.

• Judge Darlene A. Whitten (ret.) served twenty years as a Judge on the Court at Law #1, Designated Juvenile Court for Denton County, Texas. Prior to going to law school, Judge Whitten taught junior high school.

SUMMARY OF ARGUMENT

The decisions of the courts below in both *Miller* and *Jackson* are wrong. They fail to sufficiently appreciate the dramatic differences between juvenile offenders, including those who commit homicide, and adult offenders, and they fail to recognize that the unique characteristics of juveniles make it impossible to predict at the time of initial sentencing whether a juvenile might one day be ready to leave prison. These distinguishing features of juveniles make the

sentence of life without parole categorically inappropriate for juvenile homicide offenders, just as this Court has already recognized for all other juvenile offenders.

Amici emphasize four points. First, juveniles who commit homicide offenses are just like juveniles who commit other serious offenses. They are less mature than adult offenders; they are more vulnerable to negative influences; and their characters and reasoning capacities are less fully formed. They also have less control over and experience with their environment. For these and other reasons, juvenile homicide offenders, just like other juvenile offenders, are less culpable for their actions and more susceptible to change.

Second, as petitioners' cases illustrate, many of the characteristics that distinguish juveniles from adults—for example, their greater immaturity and susceptibility to negative influences and their lack of control over their environment—often contribute to their criminal conduct, even in cases of homicide.

Third, juvenile homicide offenders, like other juvenile offenders, are capable of rehabilitation. Indeed, *amici* have been repeatedly impressed by the ability of young people, even those who commit very serious offenses, to mature and grow as they become adults. *Amici* recognize, of course, that not *every* juvenile offender will reform, but *amici*'s experiences as juvenile court judges convince them that it is impossible to accurately predict at the time of initial sentencing which juveniles are capable of change and which are not. The sentence of life without parole deprives the criminal justice system of the ability to make that assessment at a more appropriate

time, *viz.*, after the juvenile has had time to mature and reform. It also deprives the community of the skills and participation of the reformed offender.

Fourth, sentencing juveniles to life without parole unnecessarily hinders their otherwise unique capacities for rehabilitation. As an initial matter, it denies these youths any incentive to try to improve themselves and sends them a clear message that society has decided that they are beyond redemption. Moreover, even for those youths who want to try to better themselves, a sentence of life without parole will often make it more difficult for them to take advantage of whatever educational, vocational, and other rehabilitative programs are available.

ARGUMENT

I. JUVENILE HOMICIDE OFFENDERS, LIKE OTHER SERIOUS JUVENILE OFFENDERS, ARE CATEGORICALLY DIFFERENT FROM ADULT OFFENDERS

As former juvenile court judges, *amici* have collectively spent decades presiding over cases involving thousands of serious (often violent) juvenile offenders. Based on their experiences, *amici* strongly believe that juvenile offenders, including those who commit homicide offenses, are categorically different from adult offenders.

As this Court has repeatedly recognized and *amici* have repeatedly witnessed, the characters of juveniles are not "as well formed" as those of adults. *Roper v. Simmons*, 543 U.S. 551, 570 (2005). Juveniles also suffer from a "lack of maturity" and an "underdeveloped sense of responsibility," and they are "more vulnerable or susceptible to negative in-

fluences." *Id.* at 569; *see Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982). Moreover, "[b]ecause juveniles' 'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions,' they are less likely to take a possible punishment into consideration when making decisions." *Graham v. Florida*, 130 S. Ct. 2011, 2028-29 (2010) (quoting *Johnson*, 509 U.S. at 367).

Because these distinguishing features find their roots in the physiology of the adolescent brain, *see Graham*, 130 S. Ct. at 2026 (noting "fundamental differences between juvenile and adult minds"); *id.* ("parts of the brain involved in behavior control continue to mature through late adolescence"); *Roper*, 543 U.S. at 570; *see generally* Brief for the American Medical Association et al. as *Amici Curiae* in *Graham*, they exist regardless of the particular offense committed by the juvenile, *see Graham*, 130 S. Ct. at 2027 ("[t]hese matters relate to the *status* of the *offenders* in question" (emphasis added)).

Juveniles are also categorically different from adults because they "have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569 (citing Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003) ("as legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting")). This, too, is true of all juveniles, regardless of the offense they may have committed.

In other words, the seriousness of the offense

simply does not change the fundamental characteristics of the offender. This Court has repeatedly suggested as much, emphasizing the broad differences between juveniles and adults even in cases involving juvenile homicide offenders. *See Roper*, 543 U.S. at 569-70; *Johnson*, 509 U.S. at 367; *Eddings*, 455 U.S. at 115-16. Thus, *all* juvenile offenders are categorically different from adults for reasons that are almost entirely out of their control—the developmental state of their brains and their surrounding environments. This is as true for juvenile homicide offenders as it is for other serious juvenile offenders.

As a result of these distinguishing characteristics, juvenile homicide offenders, like other juvenile offenders, are both less morally culpable for their actions and "more capable of change" than their adult counterparts. *Graham*, 130 S. Ct. at 2026. As this Court has explained, because "[t]he personality traits of juveniles are more transitory [and] less fixed" than those of adults, *Roper*, 543 U.S. at 570 (2005); *see Johnson*, 509 U.S. at 368 (1993), "their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 570); *see Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988). Thus, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570.

Amici strongly believe that these essential, distinguishing characteristics of youth must be taken into account when sentencing *all* juvenile offenders, including those convicted of homicide.

II. THESE CASES ILLUSTRATE THE EXTENT TO WHICH THE DISTINGUISHING CHARACTERISTICS OF YOUTH CAN CONTRIBUTE TO JUVENILE CRIMINALITY, INCLUDING HOMICIDE

Both petitioners in these cases—Evan Miller and Kuntrell Jackson—illustrate the extent to which juvenile offenders, even juvenile homicide offenders, often become involved in criminal conduct as a result of their impetuousness, their lack of maturity, their susceptibility to negative influences, and their lack of control over their environment. *Amici* do not mean to excuse or minimize petitioners' involvement in their crimes. To the contrary, *amici* recognize that both Miller and Jackson committed very serious crimes, and that substantial punishment may be appropriate as a result. But *amici* think that it is important to recognize that these juvenile offenders, like all other juvenile offenders, are less culpable for their actions than would be a similarly situated adult due to their greater immaturity, their greater susceptibility to negative influences, and their lack of control over their environment.

Both Miller and Jackson, for instance, grew up in extremely troubled homes in crime-ridden environments, and the adults in their lives, rather than trying to protect them from the negative influences surrounding them, instead often guided them *toward* those influences. Miller was emotionally and physically abused by his stepfather and repeatedly exposed to serious substance abuse. Miller Record on Appeal ("Miller R.") 83.[2] Both his mother and step-

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[2] This abuse may well have limited Miller's development in ways that made him even less mature and less capable of im-

father were alcoholics, and his mother was addicted to illicit drugs. *Id.* at 83-84. As a very young child, Miller emulated their behavior, drinking alcohol as early as age seven and using marijuana as early as age eight. *Id.* By the time he was thirteen, Miller was already abusing cocaine, prescription medications, and methamphetamines. *Id.*; *cf. Graham*, 130 S. Ct. at 2018 ("Graham's parents were addicted to crack cocaine, and their drug use persisted in his early years. . . . He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13.").

It is impossible not to see the role that drugs, alcohol, and the negative influences of family and friends played in Miller's participation in the underlying homicide. During the summer after he completed seventh grade, Miller became friendly with Colby Smith, a sixteen-year-old with a teardrop tat-

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pulse control than a typical fourteen-year-old. *See, e.g.*, Allan N. Schore, *Early Relational Trauma, Disorganized Attachment, and the Development of a Predisposition to Violence, in* Healing Trauma: attachment, mind, body, and brain 107, 110 (Marion F. Solomon & Daniel J. Siegel, eds. 2003) ("[V]iolence in children may be a product of 'negative experiences such as early maternal rejection and unstable family environment' and . . . 'child abuse, particularly that involving physical injury, may be especially damaging.'" (quoting Christopher Filley, et. al, *Toward an Understanding of Violence: Neurobehavioral Aspects of Unwarranted Physical Aggression: Aspen Neurobehavioral Conference Consensus Statement*, 14 Neuropsychiatry, Neuropsychology, & Behavioral Neurology 1 (2001))); Martin H. Teicher, *Wounds that Time Won't Heal: The Neurobiology of Child Abuse*, 2 Cerebrum 50, 60 (2000) ("[W]e now know that childhood abuse is linked with excess neuronal irritability, EEG abnormalities, and symptoms suggestive of temporal lobe epilepsy.").

too on his face, a mark that often signifies that the bearer has murdered someone. Miller Trial Tr. 979, 1001. One afternoon, Smith and Miller smoked crystal methamphetamines, and then watched as Miller's mother engaged in a drug deal with their neighbor in Miller's home. *Id.* at 1004, 1007. With the neighbor preoccupied at Miller's house, the boys decided to break into his home to look for drugs. *Id.* at 1006. Although they did not find any drugs, they stole some baseball cards before returning to Miller's home. *Id.* at 981-82.

Later that evening, the boys accompanied the neighbor to his home with the intention of robbing him; instead, the neighbor gave them money to purchase marijuana. *Id.* at 982, 1008, 1012. When the boys returned with the marijuana, they smoked it with the neighbor and played a drinking game with whiskey. *Id.* at 982-83, 1008, 1012, 1014-15. The neighbor became so intoxicated that he fell down and eventually passed out on the couch. *Id.* at 983-84. The boys decided to steal the money in the neighbor's wallet, so Miller removed it from his back pocket, and the boys divided the $300 inside. *Id.* at 984. When Miller returned the wallet to the neighbor's pocket, the neighbor woke up and grabbed Miller by the throat. *Id.* Smith picked up a baseball bat and hit the neighbor with it to free Miller. *Id.* at 985. The boys continued to beat the neighbor, and Miller, presumably still under the influence of the marijuana and whiskey, placed a sheet over his head, said he was God, and stated that he was going to kill the neighbor. *Id.* at 985-86. After returning to Miller's residence, the boys decided to go back to the neighbor's home to clean up the blood and, while there, started the fires that ultimately killed him. *Id.* at

987-88.

Jackson, too, grew up in a troubled environment: his neighborhood was infested with gang violence and drug activity, Jackson Record on Appeal ("Jackson R.") 81, and the adults in his life failed to protect him from the negative influences around him. Instead, they regularly exposed him to violence. His mother and her boyfriend fought repeatedly. *Id.* at 80. His grandmother shot her own son—Jackson's uncle. *Id.* at 81. Jackson's mother shot their neighbor after a fight broke out between Jackson's older brother and the neighbor's daughter and, as a result, went to jail when Jackson was just five or six. *Id.* at 80. Jackson's older brother also owned guns and was incarcerated for a robbery involving a shooting at the time when Jackson participated in the felony underlying the sentence at issue in this case. *Id.* at 82.

Jackson's offense demonstrates how easily juveniles in certain family and social environments can become involved in criminal conduct—even very serious criminal conduct—as a result of peer pressure and negative external influences. Seventeen days after his fourteenth birthday, Jackson accompanied some friends to a video store that they planned to rob. Jackson R. 52. Although one of his friends carried a firearm, Jackson did not. And when they arrived at the store, Jackson told his friends that he did not want to go into the store, deciding to wait outside instead. *Id.* When he later entered the store, he was shocked to see that his friends had pulled out the firearm and screamed "'I thought you all was playin'." *Id.* at 54. Jackson did not touch the firearm, much less actually shoot anyone. *Id.* at 56-

57, 68.

The death that occurred in the course of the robbery was tragic and inexcusable, but it is impossible not to see the role that immaturity, susceptibility to negative peer influences, and lack of control over his environment—factors that undeniably affect juveniles like Jackson categorically differently from how they affect adults—played in Jackson's involvement in the crime.

III. JUVENILE HOMICIDE OFFENDERS, LIKE OTHER SERIOUS JUVENILE OFFENDERS, ARE CAPABLE OF REHABILITATION

Amici have been repeatedly impressed and surprised by the ability of juvenile offenders—including very serious offenders—to change and reform as they grow older and come to better appreciate the consequences of their actions.

As this Court has recognized, juvenile offenders, including those who commit homicide, are uniquely capable of reform and rehabilitation because their personalities are not yet fully formed when they commit their offenses. *See Graham*, 130 S. Ct. at 2030 (noting that juvenile offenders are "most in need of and receptive to rehabilitation"); *Roper*, 543 U.S. at 570 ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."); *see also, e.g.*, Dorothy Otnow Lewis et al., *Toward a Theory of the Genesis of Violence: A Follow-up Study of Delinquents*, 28 J. Am. Acad. Child & Adolescent Psychiatry 431, 431 (1989) ("many violent juveniles do not become violent adults").

Amici recognize, of course, that not all juvenile offenders who commit homicide crimes will ultimately be reformed and rehabilitated; the same is true of juvenile offenders more broadly. But *amici* firmly believe that it is impossible to tell at the time of sentencing *which* juveniles will prove capable of reform. Thus, juvenile homicide offenders, like all other juveniles, should be afforded a meaningful opportunity to demonstrate growth and maturity.

A. Juvenile Homicide Offenders Are Capable of Rehabilitation If Provided the Right Opportunities

As this Court has observed, the fact that a person committed a crime as a juvenile, even a heinous crime, does not tell us who that person will be as an adult. *See supra* at 6-8. In fact, many juveniles serving life without parole sentences, including juvenile homicide offenders, come to recognize that what they did as a juvenile was deeply wrong. Many of these individuals show signs of genuine growth while in prison, taking advantage of what limited opportunities for education and personal development are available, even though they know they will be unable to make use of their new skills in the outside world. *See, e.g.*, Human Rights Watch, Amnesty Int'l, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 83-84 (2005), at http://pendulumfoundation.com/TheRestofTheirLives.pdf [hereinafter "The Rest of Their Lives"]; *see also infra* at 22-24 (describing the limited range of programs available to juvenile prisoners sentenced to life without parole).

The most compelling proof that juvenile homicide offenders are capable of rehabilitation comes from

those offenders who have been released from prison and become law-abiding, productive citizens as adults. Raphael Johnson, for example, committed murder at the age of 17. After being thrown to the ground during an altercation at a party, he went to a friend's car, got a gun, and fired three shots, killing a man who had not even been involved in the fight. *See Juvenile Justice Accountability and Improvement Act of 2007: Hearing on H.R. 4300 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 54-58, at 55 (2008) (statement of Raphael B. Johnson). Johnson was tried as an adult, convicted of murder, and sentenced to 10 to 25 years in prison. *Id.* In his first years behind bars, Johnson admits that he was not a model inmate; he violated prison rules and was placed in solitary confinement. *Id.* at 55-56. But over time his outlook began to change. *Id.* at 56. He took advantage of the educational programs available to him, explored his religious beliefs, and maintained strong bonds with his family and friends. *Id.*

After serving twelve years in prison, Johnson was released. *Id.* at 57. In the four years following his release, he earned his college degree, graduating with high honors, and went on to earn a master's degree as well. *Id.* He married his childhood sweetheart and had two children. *Id.* Johnson worked as a community reintegration coordinator, helping other ex-offenders re-enter society, and even started his own company, through which he works as a motivational speaker. *Id.* Johnson has expressed remorse for his crime and explained how additional life experience has afforded him perspective on the pain he caused, a fact that he was unable to fully appreciate

as a teenager. *Id.* at 58.

Oshea Israel is another example of a juvenile homicide offender who proved capable of reform as he grew into an adult. *See* NPR, *Forgiving Her Son's Killer: "Not An Easy Thing"* (May 20, 2011), http://www.npr.org/2011/05/20/136463363/forgiving-her-sons-killer-not-an-easy-thing. At the age of sixteen, Israel killed a twenty-year-old after getting into a fight with him at a party. *Id.* While in prison, Israel met his victim's mother and started changing his approach to life. *Id.* Recently released from prison, he is now pursuing his college degree and has developed a close relationship with the mother of his victim. *Id.* He has explained that he hopes to "prove himself" to her. MailOnline, *Woman shows incredible mercy as her son's killer moves in next door* (June 8, 2011), http://www.dailymail.co.uk/news/article-2000704/Woman-shows-incredible-mercy-sons-killer-moves-door.html#ixzz1hw0jIdyb.

Studies of juvenile homicide offenders mirror the lessons of Johnson's and Israel's stories, making clear that many youths who have committed homicide offenses are capable of rehabilitation and growth. *See, e.g.*, Michael P. Hagan, *An Analysis of Adolescent Perpetrators of Homicide Upon Return to the Community*, 41 Int'l J. of Offender Therapy & Comparative Criminology 250, 254 (1997) (forty percent of youths convicted of homicide or attempted homicide and committed to juvenile correctional facility in Wisconsin in the 1970s and 1980s had not been convicted of any additional crimes five or more years after their release from the facility); John Hubner, Last Chance in Texas: The Redemption of Criminal Youths 20, 251 (2005) (relating, among

other stories of serious juvenile offenders, one juvenile's involvement in a drive-by shooting that killed a 20-year-old man and the offender's subsequent release after completing an intensive rehabilitation program at the Giddings State School).

These stories and studies merely confirm what *amici* already know from their own experiences: many juvenile offenders, even the most serious among them, are capable of reform and rehabilitation.

B. It Is Impossible To Predict at Sentencing How a Juvenile Will Change Over Time

Amici recognize, of course, that a desire to change is not always enough to ensure change. And recitation of regret for one's crimes does not absolve a juvenile offender of responsibility for his actions or guarantee that he will not commit further crimes if released.

But *amici* strongly believe that juvenile offenders, including those convicted of homicide offenses, deserve the opportunity to turn their lives around, and that the best time to evaluate whether they have successfully done so is after they have had time to mature, not when they are initially sentenced. Based on decades of experience sentencing juvenile offenders, *amici* simply do not believe it is possible to tell which youths will change and which will not at the time of their initial sentencing.[3]

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[3] Notwithstanding this unpredictability, *amici* do believe that individualized consideration is essential at the initial sentencing stage. *See, e.g.*, *Pepper v. United States*, 131 S. Ct. 1229, 1239-40 (2011) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider

In fact, throughout their many years as juvenile court judges, *amici* were repeatedly surprised and encouraged by the ability of youths, including those who commit the most serious crimes, to grow and change. *Amici* were also struck by the difficulty of predicting which youths would successfully reform and which would not. *See Roper*, 543 U.S. at 573 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."); *Naovarath v. State*, 105 Nev. 525, 530 (1989) ("We may possibly have in the child before us the beginning of an irremediably dangerous adult human being, but we certainly cannot know that fact with any degree of certainty *now*.").

Amici are hopeful that Miller and Jackson may too one day mature into responsible, law-abiding

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every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996))); *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring in the judgment) ("Our system depends upon sentencing judges applying their reasoned judgment to each case that comes before them."); *cf.* Michael A. Corriero, Judging Children as Children: A Proposal for a Juvenile Justice System 71 (2006) ("We must examine each child's individual circumstances and social history."). Thus, although *amici* believe that *no* juvenile should be sentenced to life without parole, *amici* are even more troubled by the fact that the petitioners in these cases were subject to *mandatory* life without parole sentences and thus were denied any individualized consideration even at their initial sentencing. *See Graham*, 130 S. Ct. at 2031 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

adults. Before he was sentenced, Jackson apologized to the family of the victim. Jackson R. 62. And Miller has learned to accept responsibility for his actions: his pretrial psychological evaluation notes that "he previously would have given more antisocial responses," but that "he 'got saved at 15,'" and now "recognizes that he should do 'the right thing.'" Miller R. 85. *Amici* believe that these children should not be condemned to die in prison without being given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham*, 130 S. Ct. at 2030.

Imposing a sentence of a term of years (even a long one)—as opposed to a sentence of life without parole—recognizes that although these children "deserve[] to be separated from society for some time," "it does not follow that [they will] be a risk to society for the rest of [their] li[ves]." *Graham*, 130 S. Ct. at 2029; *see Naovarath*, 105 Nev. at 531 ("It does not seem to us, from the record, that the trial judge had enough information to make the predictive judgment that this particular thirteen-year-old boy should never again see the light of freedom. A strong argument exists for the proposition that the parole board is best suited to make this kind of judgment at some future time."); *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968) ("We believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."); *cf. Graham*, 130 S. Ct. at 2030 ("Those who commit truly horrifying crimes as juveniles may turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives. The Eighth Amendment does not fore-

close [that]. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society.").

Leaving open the possibility of parole allows society to assess down the road—after the juvenile has had the time necessary to grow, mature, and change—whether it is necessary for a 25, 35, or 45-year-old to remain in prison for a crime he committed early in his formative years. Life without parole sentences, however, eliminate the possibility of such meaningful consideration of a juvenile offender's demonstrated rehabilitation.

IV. A LIFE WITHOUT PAROLE SENTENCE SIGNIFICANTLY LIMITS A JUVENILE'S ABILITY TO REFORM AND CHANGE

Amici believe that sentencing juvenile offenders to life without parole is wrong because it meaningfully hinders a juvenile's otherwise unique prospects for reform and rehabilitation. Juvenile homicide offenders, like all other juvenile offenders, should be given the chance to better themselves in prison and afforded a meaningful opportunity to obtain release based on a showing that they have done so.

A. Sentencing Juveniles to Life Without Parole Denies Them Hope and the Incentives To Try To Reform

Life without parole is, under any circumstance, a severe sentence—the most severe possible after capital punishment. But as this Court recognized in *Graham*, it is "an especially harsh punishment for a juvenile." *Graham*, 130 S. Ct. at 2028. This is, in part, because it reflects "an irrevocable judgment about that person's value and place in society."

Graham, 130 S. Ct. at 2030; *see Naovarath*, 105 Nev. at 529 (life without parole reflects a judgment that the child "can never be reformed"). It sends a clear message to the juvenile that society has given up on him or "written [him] off." Ill. Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children Sentenced to Life Without Possibility of Parole in Illinois* 20 (2008), http://webcast-law.uchicago.edu/pdfs/00544_Juvenile_Justice_Book_3_10.pdf [hereinafter, "Categorically Less Culpable"]. This is a particularly cruel message to send to juvenile offenders, many of whom may feel as though they have already been abandoned by their parents and other family members. *See, e.g.*, Rolf Loeber & Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, 7 Crime & Just. 29, 29 (1986) ("Analyses of longitudinal data show that socialization variables, such as lack of parental supervision, parental rejection, and parent-child involvement, are among the most powerful predictors of juvenile conduct problems and delinquency."); Hattie Ruttenberg, *The Limited Promise of Public Health Methodologies To Prevent Youth Violence*, 103 Yale L.J. 1885, 1900 (1994) ("[j]uvenile delinquency has been found to correlate with a history of childhood abuse and neglect"); *see also* Irene Sullivan, Raised by the Courts: One Judge's Insight into Juvenile Justice 97 (2010) ("The link between child abuse and juvenile delinquency is well established; indeed, irrefutable."); H. Ted Rubin, Juvenile Justice: Policies, Practices, and Programs P4-1 (2003) ("Court juveniles' problems include . . . drug addicted parents, serious neglect by parents, violent victimization.").

Life without parole amounts to the "denial of hope," *Graham*, 130 S. Ct. at 2027, such that juveniles receiving the sentence often see little reason to try to educate or otherwise improve themselves. Life without parole means that "good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Id.* (quoting *Naovarath*, 105 Nev. at 526). As one juvenile offender explained: "'It makes you feel that life is not worth living because nothing you do, good or bad, matters to anyone. You have nothing to gain, nothing to lose, you are given absolutely no incentive to improve yourself as a person. It's hopeless.'" Human Rights Watch, *"When I Die, They'll Send Me Home," Youth Sentenced to Life without Parole in California* 60 (Jan. 2008), www.hrw.org/reports/2008/us0108/ us0108web.pdf [hereinafter, "Youth Sentenced to LWOP in California"]; *see also id.* (juvenile offender sentenced to life without parole reporting that "[t]here's no words to describe this experience. I'd rather be dead"); The Rest of Their Lives, at 63 (another juvenile offender sentenced to life without parole asking "'what am I supposed to hope for except for dying tomorrow maybe?'").

B. Sentencing Juveniles to Life Without Parole Denies Them Opportunities To Participate In Educational and Rehabilitation Programs

Even juvenile offenders sentenced to life without parole who want to change will often find that their sentence makes it more difficult for them to do so. Although the adult prisons where these juveniles

will be serving most (if not all) of their sentences generally provide educational, vocational, and other self-help programs, access to these opportunities is often foreclosed to prisoners sentenced to life without parole. *See, e.g.*, Human Rights Watch, *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States* 27 (2012), http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf [hereinafter "Against All Odds"] (noting that in at least 22 states "educational and vocational programs ordinarily available to most inmates are frequently denied to those serving life without parole, including those sentenced as juveniles"); Categorically Less Culpable, at 21 (explaining that juvenile offenders sentenced to life without parole had "little or no access to educational programs" because those "programs often were, and are, expressly denied to those serving life without parole sentences").[4]

Funding and resource constraints, for example, often limit access to such programs to offenders who may be eligible for release. *See, e.g.*, The Rest of Their Lives, at 69 ("Most child offenders who have been sentenced to life without parole are denied access to further education or vocational programs for a very simple reason: the state and the federal government do not expect them ever to leave prison and

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[4] Juvenile offenders' inability to participate in educational and vocational programs may reinforce for these youths the impression that society has given up on them. As one offender explained with respect to his inability to enroll in his prison's GED program, "'[t]he officials say there are more important people that need to take these classes that actually have a chance to get out someday.'" Categorically Less Culpable, at 21.

so reserve the already underfunded programs for those who will."); Youth Sentenced to LWOP in California, at 56 ("[P]rison practice and regulations give persons sentenced to life without parole the lowest priority for accessing programs. Interviewees told Human Rights Watch that their sentence puts them on the lowest rung of waiting lists for GED classes and substance abuse rehabilitation groups like Alcoholics Anonymous . . . ."); The Rest of Their Lives, at 70 ("Correctional authorities in a number of states told a researcher for this report on the record that inmates serving life without parole sentences were at the 'bottom of the list' for getting access to vocational training. Officials cited their state's need 'to put our resources where the inmates who are going home can access them first.'").

And in some states, "[s]ecurity classifications" can "limit participation in existing programs." Against All Odds, at 29. Although "[m]ost prisoners can reduce their security level over time through good behavior," it is exceedingly difficult for those serving life without parole to do so. Youth Sentenced to LWOP in California, at 57; *see id.* at 57-58 (explaining that "for those serving life without parole, a change in security classification . . . requires a decision by the Deputy Director after review by a classification committee"); *cf.* Against All Odds, at 28-29 (explaining how juveniles and those serving life without parole generally receive more restrictive security classifications). Thus, even if juvenile offenders exhibit exemplary behavior over the course of many years in prison, they may continue to be denied opportunities to better themselves at the ages of 35 and 55 based on a single act they committed at the age of 15.

The denial of access to these programs is particularly troubling because participation in educational and vocational programs can be "an important step on the path toward rehabilitation," Categorically Less Culpable, at 22; *see, e.g.*, Michael A. Corriero, Judging Children as Children: A Proposal for a Juvenile Justice System 59-60 (2006) (discussing the importance of education to rehabilitation), especially for juvenile offenders who will spend their formative teenage years behind bars, *see* Against All Odds, at 32 ("young offenders are incarcerated during the period of their lives when education and skill development are most crucial").

Amici have personally observed the potential transformative power of prison educational and rehabilitative programs. For example, one of *amici* sentenced a sixteen-year-old who had killed a taxi driver to serve 15 to 20 years, the sentence mandated by his jurisdiction at the time for first degree murder committed by a juvenile. The juvenile matured while in prison and was deemed fully rehabilitated by the time he had served the 15 year minimum. Another of *amici* sentenced a homicide offender roughly the same age as Miller and Jackson to serve nine years to life in prison. That young man has educated himself significantly while in prison and, over time, has come to recognize the wrong that he committed and has expressed remorse for his actions. Both of these examples reflect *amici*'s belief that access to rehabilitative programs while in prison, combined with the added maturity that comes with age, can effect substantial, meaningful changes in a young offender.

CONCLUSION

For the foregoing reasons and those stated in petitioners' briefs, this Court should reverse the judgments below.

Respectfully submitted,

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January 17, 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JAN 17 2012
OFFICE OF THE CLERK

Nos. 10-9646 and 10-9647

IN THE SUPREME COURT OF THE UNITED STATES

EVAN MILLER,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Writ Of Certiorari To The
Alabama Court Of Criminal Appeals

KUNTRELL JACKSON,
Petitioner,
v.
RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,
Respondent.

On Writ Of Certiorari To The
Supreme Court Of Arkansas

BRIEF OF JUVENILE LAW CENTER *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iv

INTEREST OF *AMICI CURIAE*.....1

IDENITY OF *AMICI*.....1

STATEMENT OF FACTS.....2

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. A JUVENILE LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE.....6

A. The Eighth Amendment Requires That Sentences Be Proportionate.....7

B. The Eighth Amendment Requires A Separate Proportionality Analysis For Juvenile Offenders.....8

II. MANDATORY LIFE WITHOUT PAROLE SENTENCES UNCONSTITUTIONALLY DEPRIVE JUVENILES OF ANY CONSIDERATION OF THE RELEVANT CHARACTERISTICS OF YOUTH.....12

A. Mandatory Sentences Of Life Without Parole For Juveniles Impermissibly Prevent This Court From Fulfilling Its Constitutional Review Function.....15

B. Mandatory Sentences Of Life Without Parole For Juveniles Impermissibly Undermine The Reliability Of The Sentence As It Relates To The Defendant's Moral Culpability And Potential For Maturity And Reform.....18

III. THE IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A JUVENILE WHO DID NOT KILL OR INTEND TO KILL IS IMPERMISSIBLE UNDER THE EIGTH AMENDMENT.....24

A. The Rationale Behind Felony Murder Does Not Justify Imposing Life Without Parole Sentence.....26

1. Juveniles' Decision-Making and Risk-Assessment Are Less Developed Than Adults'.....27

2. Juveniles Are Particularly Vulnerable To Negative Influences And Outside Pressures.....28

B. Juvenile Life Without Parole Sentences For Felony Murder Serve No Penological Purpose.....29

IV. THE HEIGTENED RISK OF WRONGFUL CONVICTIONS WEIGHS AGAINST IMPOSING OF LIFE WITHOUT PAROLE SENTENCES ON JUVENILES.....32

CONCLUSION.....36

APPENDIX: Identity of *Amici* and Statements of Interest.....A1

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INTEREST OF *AMICI*[1]

The organizations submitting this brief work on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. *Amici* are advocates and researchers who have a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems. *Amici* know that youth who enter these systems need extra protection and special care. *Amici* understand from their collective experience that adolescent immaturity manifests itself in ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that a core characteristic of adolescence is the capacity to change and mature. For these reasons, *Amici* believe that youth status separates juvenile and adult offenders in categorical and distinct ways that warrant distinct treatment under the Eighth Amendment.

IDENTITY OF *AMICI*

See Appendix for a list and brief description of all *Amici*.

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[1] The consent of counsel for all parties is on file with the Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. A brief description of all *Amici* appears in the Appendix.

STATEMENT OF FACTS

Amici adopt the statement of facts as articulated in the briefs of Petitioners Kuntrell Jackson and Evan Miller.

SUMMARY OF ARGUMENT

The imposition of life without parole sentences on juveniles violates the Cruel and Unusual Punishments Clause of the Eighth Amendment. As the Supreme Court has held, juvenile offenders are categorically different from adult offenders in constitutionally relevant ways. According to settled research, juveniles are immature in their judgment and decision-making capacities, they are especially susceptible to negative peer pressures, and they are uniquely capable of transformation and rehabilitation. As found in *Roper v. Simmons* and *Graham v. Florida*, juveniles as a class are less culpable for their criminal conduct than adults.

Culpability is a cornerstone of our criminal justice system, and it is central to ensuring that sentences are rational and proportional under the Eighth Amendment. Traditionally, the Court has looked primarily to the nature of the offense to assess proportionality. In the case of juveniles, this Court has modified its traditional Eighth Amendment analysis to focus specifically on the unique attributes and characteristics of the juvenile offender in reviewing the constitutionality of sentences. The reduced culpability of juveniles renders life without parole sentences inherently disproportionate under

the Eighth Amendment and thus categorically impermissible.

In the instant cases, the sentencing schemes in Alabama and Arkansas compound the constitutional infirmity of a life without parole sentence. In both cases, the sentences were mandatory. Following this Court's reasoning in striking mandatory death sentences under the Eighth Amendment, a mandatory juvenile life without parole sentence by its nature precludes considerations of the individual juvenile offender or the circumstances of his crime. Absent these considerations neither the sentencer nor the reviewing court have any ability to assess the proportionality of the sentence to a particular juvenile. A mandatory scheme thus precludes constitutionally relevant evidence of youth, lesser criminal involvement, and potential for maturity and therefore impermissibly taints the reliability of the sentence. Additionally, Jackson's life without parole sentence following a conviction of felony murder is squarely at odds with this Court's holding in *Graham* that juveniles who neither kill, intend to kill, or foresee that life will be taken are constitutionally ineligible for such sentences.

Finally, this Court has repeatedly acknowledged that the risk of wrongful convictions is of concern in evaluating the harshest sentences imposed on certain categories of offenders. Research demonstrates that juveniles are particularly at risk of giving false confessions because of their developmental characteristics, further supporting increased scrutiny of such sentences under the Constitution.

ARGUMENT

In the last six years, this Court has issued three landmark decisions that profoundly alter the status and treatment of juveniles in the justice system. Construing the Eighth Amendment, the Court abolished the juvenile death penalty in 2005 in *Roper v. Simmons*. In 2010, the Court struck a sentence of life without parole imposed on a juvenile convicted of a nonhomicide offense in *Graham v. Florida*. Last term, interpreting the Fifth and Fourteenth Amendments, the Court held in *J.D.B. v. North Carolina* that a juvenile's age is relevant to the *Miranda* custody analysis. In all three cases, the Court adopted settled research regarding adolescent development and required the consideration of the attributes of youth when applying constitutional protections to juvenile offenders.

The constitutionality of a life without parole sentence imposed on juveniles convicted of homicide offenses is now before the Court. Jackson and Miller were fourteen years old at the time of their offenses. Jackson was convicted of capital felony murder based upon his participation in an attempted robbery in which the victim was killed by a co-defendant; Miller was convicted of capital murder. In both cases, the sentences were mandatory upon conviction under the relevant state law. *Amici* submit that this Court's current Eighth Amendment jurisprudence concerning what constitutes cruel and unusual punishment for *juveniles* requires that these sentences be struck.

Roper confirmed that juveniles are sufficiently less blameworthy than adults, such that the application of different sentencing principles is required under the Eighth Amendment, even in cases of capital murder. *Roper's* distinct doctrinal approach was extended to sentences of life without parole in *Graham*, as the Court saw no meaningful distinction between a sentence of death or life without the possibility of parole. That death comes later or more slowly in the latter instance does not alter the stark finality of the sentence.

Graham and *Roper* have equal application here. Together, they dictate a distinct Eighth Amendment analysis for juveniles, premised on the simple fact that youth are different for the purposes of criminal law and sentencing practices. Relying on prevailing developmental research and common human experience concerning the transitions that define adolescence, the Court has recognized that the age and special characteristics of young offenders play a critical role in assessing whether sentences imposed on them are disproportionate under the Eighth Amendment. As both the majority and the dissent agreed in *Roper* and *Graham*, this Court has supplanted its 'death is different' analysis in adult Eighth Amendment cases for an offender-focused 'kids are different' frame in juvenile cases. *See Graham v. Florida*, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting); *Roper v. Simmons*, 543 U.S. 551, 558-59 (2005) (O'Connor, J., dissenting).

Juveniles are uniquely different from any other category of offender; the Court has properly

crafted a separate Eighth Amendment analysis to take account of their exceptional status.

I. A JUVENILE LIFE WITHOUT PAROLE SENTENCE IS UNCONSTITUTIONALLY DISPROPORTIONATE

When evaluating sentences under the Eighth Amendment, this Court must look "beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'" *Graham v. Florida*, 130 S. Ct. at 2021 (citing *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).[2] *Graham* and *Roper* reflect the Court's own evolving understanding of the salient developmental differences between juveniles and adults. As these developmental differences continue to inform this Court's decisions involving children's constitutional rights in the justice system, the scrutiny of juvenile sentencing practices must yield to a different set of constitutional principles.

A. The Eighth Amendment Requires That Sentences Be Proportionate

"Proportionality" is central to the Court's analysis of sentencing practices under the Eighth Amendment. *See, e.g., Graham*, 130 S. Ct. at 2021 (citing *Solem v. Helm*, 463 U.S. 277 (1983)) (interpreting the Eighth Amendment's ban on cruel and unusual punishment to include punishments that are "unconstitutionally excessive"). Cases

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[2] The cruel and unusual standard "embodies a moral judgment," which "must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (internal citation omitted).

addressing the proportionality of sentences "fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Id.* The "categorical" classification of cases assesses the proportionality of a sentence as compared to the nature of the offense or the *characteristics of the offender*. *Id.* at 2022. Thus, some offenders have characteristics that make them categorically less culpable than other offenders who commit similar or identical crimes. *See, e.g., Roper*, 543 U.S. 551 (striking the death penalty for juvenile defendants); *Atkins v. Virginia*, 536 U.S. 304 (2002) (striking the death penalty for mentally retarded defendants); *Kennedy*, 554 U.S. 407 (striking the death penalty for defendants convicted of rape where the crime was not intended to and did not result in the victim's death); *Graham*, 130 S. Ct. 2011 (striking sentences of juvenile life without parole in nonhomicide cases).

The Court has adopted a two-pronged analysis in categorical challenges. It first considers "objective indicia of society's standards as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the practice. *Roper*, 543 U.S. at 563. Next, the Court must determine "in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham*, 130 S. Ct. at 2022 (citing *Roper*, 543 U.S. at 572). The Court's 'judgment' is guided by its "own understanding and interpretation of the Eighth

Amendment's text, history, meaning and purpose." *Id.* (citing *Kennedy*, 554 U.S. at 421). While community consensus is "entitled to great weight," it "is not itself determinative of whether a punishment is cruel and unusual." *Graham*, 130 S. Ct. at 2026 (citing *Kennedy*, 554 U.S. at 435). Ultimately, the task of interpreting the Eighth Amendment remains the responsibility of this Court. *Roper*, 543 U.S. at 575.

In exercising its own judgment, the Court considers the culpability of the offender in light of his crime and individual characteristics; the severity of the punishment in question; and whether the challenged punishment serves legitimate penological goals. *Id.* at 568, 571-72.

B. The Eighth Amendment Requires A Separate Proportionality Analysis For Juvenile Offenders

As Justice Frankfurter wrote over fifty years ago, "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." *May v. Anderson*, 345 U.S. 528, 536 (1953). *Graham* echoed this point: Justice Kennedy observed that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." 130 S. Ct. at 2031. Accordingly, a developmental framework for assessing juvenile sentencing practices has emerged, narrowing the

range of permissible sentencing options for offenders under the age of eighteen.

A child's age is far "more than a chronological fact"; it bears directly on children's constitutional rights and status in the justice system. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Graham* and *Roper* enriched the Court's longstanding view of juveniles with scientific research confirming that youth merit distinctive treatment under the Eighth Amendment. *See, e.g.*, Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psychol. 1764 (2008).[3] Indeed, this Court has been explicit that juvenile status drives constitutional status in juvenile and criminal proceedings. *See, e.g.*, *Haley v. Ohio*, 332 U.S. 596, 601 (1948) ("Formulas of respect for constitutional safeguards cannot prevail over the facts of life which contradict them."). *See also Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (in confession case, observing that an adolescent "cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.").

The *Graham* Court noted three characteristics that distinguish youth from adults for culpability purposes: 1) juveniles have a "lack of maturity and an underdeveloped sense of responsibility;" 2) they

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[3] The Court in *J.D.B.* noted that "[a]lthough citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions [that children are different than adults], the literature confirms what experience bears out." 131 S. Ct. at 2403 n.5.

"are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;" and 3) their characters are "not as well formed." 130 S. Ct. at 2026 (internal quotations omitted). The Court noted that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70, 573). This Court concluded, "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).[4]

The culpability of the offender is a cornerstone of our criminal justice system and central to ensuring the rationality of sentencing. *See Tison v. Arizona*, 481 U.S. 137, 156 (1987) ("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished."). This Court has held that juveniles as a class have a reduced culpability for their criminal conduct. Because of this reduced culpability, life without parole sentences are categorically unconstitutional when imposed on a juvenile.[5]

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[4] *See* Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 31 (2008) (explaining that "[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a stake in their future, and mature judgment.")

[5] This Court has recognized that "[l]ife without parole is an especially harsh punishment for a juvenile." *Graham*, 130 S. Ct.

at 2028. A life without parole sentence imposed on a child is not only longer, it is also qualitatively different. The conditions children face in adult prisons exacerbate the disproportionality of juvenile life sentences. *See* Human Rights Watch, *Against All Odds: Prison Conditions for Youth Serving Life Without Parole Sentences in the United States*, 18 (2012), http://www.hrw.org/reports/2012/01/03/against-all-odds-0. (reporting that almost all youth offenders serving life without parole interviewed or surveyed by Human Rights Watch suffered physical violence at the hands of other inmates); *id.* at 14, n.24 ("In 2005 . . . individuals under the age of 18 made up less than 1 percent of all inmates in U.S. jails. Yet 21 percent of all victims of substantiated incidents of sexual abuse involving jail inmates that year were under the age of 18.") (internal citation omitted); Marty Beyer, *Experts For Juveniles At Risk of Adult Sentences*, in MORE THAN MEETS THE EYE: RETHINKING ASSESSMENT COMPETENCY AND SENTENCING FOR A HARSHER ERA OF JUVENILE JUSTICE (P. Puritz, A. Capozello, & W. Shang eds., 1997) ("Youth in adult facilities were eight times more likely to commit suicide than their counterparts held in the juvenile justice system."); Jason J. Washburn et al., *Psychiatric Disorders Among Detained Youths: A Comparison of Youths Processed in Juvenile Court and Adult Criminal Court*, 59 Psychiatric Servs. 966, 969-70 (2008) (noting that 35% of detained adult males have a psychiatric disorder as compared to 64% of youths in adult custody and "the conditions associated with extended detention, such as separation from loved ones, crowding, and solitary confinement, may increase the risk of suicidal behavior."). The lack of rehabilitation afforded to juveniles serving life without parole sentences further aggravates the disproportionate nature of the sentence. *See Graham*, 130 S. Ct. at 2030 ("[D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates. For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.") (internal citations omitted).

II. MANDATORY LIFE WITHOUT PAROLE SENTENCES UNCONSTITUTIONALLY DEPRIVE JUVENILES OF ANY CONSIDERATION OF THE RELEVANT CHARACTERISTICS OF YOUTH

Petitioners Miller and Jackson both received mandatory life without parole sentences after conviction of a homicide offense. These sentences were imposed without any consideration of the particularities of their underlying offenses or their relative moral culpability and are therefore unconstitutional. *Amici* support a categorical ban on such terminal sentences for juveniles in all cases. As discussed above, this Court's Eighth Amendment proportionality analysis forecloses the imposition of such sentences. Additionally, under any circumstances, there is no place in this Court's Eighth Amendment jurisprudence for *automatic* sentences of life without parole for juveniles in homicide cases.

This Court held over three decades ago that mandatory death sentences for adults are, in all cases, unconstitutional:

> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and

> record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process. . . .

Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (citation omitted). *See also Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) (Court recognized over seventy-five years ago that justice in sentencing "generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

The recognition that the elements of criminal offenses alone are generally insufficient to provide an accurate sentencing picture has animated this Court's constitutional criminal law jurisprudence throughout the post-World War II era. *See, e.g.*, *Williams v. New York*, 337 U.S. 241, 247 (1949) ("Highly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.") (footnote omitted). The *Williams* Court fully understood that considerations for conviction were necessarily different than those for punishment. The Court noted:

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. The whole country has

> traveled far from the period in which the death sentence was an automatic and commonplace result of convictions.

Id. This observation ultimately informed the Court's subsequent ruling that mandatory death sentence schemes violated the Eighth and Fourteenth Amendments. Because mandatory sentences preclude consideration of both the individual aspects of the crime and the offender, mandatory sentences of death are uniformly prohibited. *See Sumner v. Shuman*, 483 U.S. 66, 74 (1987) (terminal sentencing schemes must permit "the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual," no matter how aggravated the homicide).

The analysis foreclosing mandatory capital punishment should likewise apply to the terminal sentence of life without the possibility of parole for juveniles. In the instant situation, the individual characteristics of the offenders require judicial scrutiny before a terminal sentence of life without parole can be imposed under the Eighth Amendment. Yet neither the Alabama nor Arkansas sentencing schemes permit any consideration of the offender's age, maturity, or potential for reform. *See Graham*, 130 S. Ct. at 2032. Therefore, like adult mandatory death sentences, mandatory life without parole sentences for juveniles must be prohibited in all cases.

A. Mandatory Sentences Of Life Without Parole For Juveniles Impermissibly Prevent This Court From Fulfilling Its Constitutional Review Function

In the adult death penalty context, a mandatory sentencing procedure implicates the Eighth Amendment's requirement of heightened reliability of such sentences. Heightened reliability is necessary because: "the penalty of death is qualitatively different from a sentence of imprisonment. . . . Because of that qualitative difference, there is a corresponding difference in the *need for reliability in the determination that death is the appropriate punishment in a specific case.*" *Woodson*, 428 U.S. at 305 (emphasis added). Such heightened reliability can only be accomplished if courts are satisfied that the procedures in place adequately ensure that the sentence properly reflects the moral culpability of the offender. *See Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (jurors must be allowed to express a "reasoned moral response" regarding the defendant's "moral culpability").

This is precisely the same question courts must face when assessing a juvenile sentence of life without parole because "an offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendant's youthfulness into account at all would be flawed." *Graham*, 130 S. Ct. at 2028.

The same heightened reliability concerns that forced the ban on adult mandatory death sentences

likewise bar the imposition of mandatory juvenile life without parole sentences. First, there is no meaningful constitutional difference between adult capital sentences and juvenile life without parole sentences. As this Court noted in *Graham*:

> [L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration. . . .

130 S. Ct. at 2027. As Chief Justice Roberts made plain, "*Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate. . . ." *Id.* at 2039 (Roberts, C.J., concurring).

First, the *Graham* majority held that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their eligibility to re-enter society. 130 S. Ct. at 2030. Moreover, *Graham* and *Roper* both explicitly provide that the capacity of juvenile offenders to change and grow, combined with their reduced blameworthiness and inherent immaturity, set them apart from adult offenders in pronounced, constitutionally relevant ways. Mandatory

sentencing schemes by definition preclude individualized determinations. This 'one size fits all' sentencing practice is thus directly at odds with *Graham* and *Roper*, since it bars consideration of age at all in sentencing while simultaneously proscribing any "realistic opportunity" for release. *Id.* at 2034.

Second, automatic sentencing procedures undermine reliability by precluding the consideration of the relationship between the sentence and constitutionally relevant factors such as the nature of the particular offense and the specific offender. Such proportionality determination is constitutionally required in any review of juvenile life without parole sentences. *Id.* at 2030. Mandatory sentencing schemes preclude such review and therefore violate the Constitution.

In any juvenile case in which the sentence is life without parole, the lack of reliability in the sentence or verdict impermissibly impairs the Court's ability to conduct the constitutionally mandated proportionality evaluation. In short, no court can have any confidence that a mandatory sentence of life without parole for a juvenile has a sufficient relationship to that offender's personal moral culpability, maturity, or potential for reform.

B. Mandatory Sentences Of Life Without Parole For Juveniles Impermissibly Undermine The Reliability Of The Sentence As It Relates To The Defendant's Moral Culpability And Potential For Maturity And Reform

In *Roper*, this Court held that the juvenile death penalty violated the Eighth Amendment because juveniles are presumed to be less morally culpable than adults who may commit the same crime. 543 U.S. at 570. In *Graham*, the Court relied on the same youthful characteristics to categorically ban sentences of life without parole for juveniles in nonhomicide crimes, particularly because "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." 130 S. Ct. at 2029; *see also id.* at 2038 (Roberts, C.J., concurring).[6]

The flaw in mandatory life without parole statutes is that the constitutionally relevant qualities associated with juveniles may never be considered by the sentencing court. Rather, this Court's acknowledgement of youth's diminished moral culpability in *Roper* and *Graham* is replaced with a non-rebuttable presumption of equal moral culpability between adults and juveniles. In other words, mandatory sentences of life without parole

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[6] Chief Justice Roberts in *Graham* characterized the Court's juvenile punishment cases as recognizing "that juvenile offenders are *generally* – though not necessarily in every case – less morally culpable than adults who commit the same crimes." 130 S. Ct. at 2038 (Roberts, C.J., concurring).

rest on the unconstitutional premise that juveniles are *always* as morally culpable as adults.

As was found in the adult death penalty context, such a premise unconstitutionally undermines the reliability that the sentence is an actual reflection of the moral culpability of the juvenile offender:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the [punishment].

Woodson, 428 U.S. at 304. In the context of juvenile sentencing, the constitutionally relevant factors of maturity and potential for reform are among those "relevant facets of character" that are precluded by a mandatory sentence. In his concurrence in *Graham*, Justice Roberts cautioned that "[o]ur system depends upon sentencing judges applying their reasoned judgment to each case that comes before them." *Id.* at 2042 (Roberts, C.J., concurring). Mandating a life without parole sentence violates *Graham* at both the

front and back end of the sentence as the individual characteristics and circumstances of the juvenile offender will not, as a matter of law, *ever* be considered.[7]

In the instant cases, both Petitioners presented evidence of their youth at the time of the offense – a constitutionally relevant sentencing factor that the mandatory scheme precluded from consideration. The Petitioners also provided other compelling evidence regarding the circumstances of the offense and their personal qualities that indicated diminished moral culpability beyond (and intertwined) with their very young age.

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[7] The high prevalence of disabilities in juveniles involved in the criminal justice system further impedes the reliable assessment of juvenile culpability. Incarcerated youth are significantly more likely to have a mental disorder than youth in the general population. *See* Seena Fazel et al., ***Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Metaregression Analysis of 25 Surveys***, 47 J. Am. Acad. Child Adolescent Psych. 1010, 1016 (2008); Christopher B. Forrest et al., ***The Health Profile of Incarcerated Male Youths***, 105 Pediatrics 286, 289 (2000). Between 70 and 100 percent of "incarcerated youth meet [the] normal [diagnostic] criteria for at least one disorder," with "approximately 20% of youth meeting diagnostic criteria for a serious mental health disorder -- defined as serious emotional disturbance resulting in functional impairment." Candice L. Odgers et al., ***Misdiagnosing the Problem: Mental Health Profiles of Incarcerated Juveniles***, 14 Can. Child Adolescent Psych. Rev. 26, 27 (2005). By comparison, the prevalence of *any* disorder in the general youth population is approximately 1 in 3, with only 1 in 10 youth meeting the criteria for a serious disorder. *Id.* Mandatory life without parole sentencing prevents the sentencer from considering how a disability impacts the youth's overall culpability.

Specifically, Petitioner Jackson was a non-trigger person convicted of felony murder. Mandatory sentences of life without parole for a juvenile convicted of felony murder are particularly problematic. Because individuals with varying levels of intent and involvement can be convicted of felony murder, the level of moral culpability and appropriate sentence should involve a particularly individualized assessment. In death penalty cases involving adults convicted of felony murder, this Court has recognized the importance of individualized determinations, including the need to examine the offender's "intentions, expectations, and actions." *Enmund v. Florida*, 458 U.S. 782, 800 (1982). *See also id.* at 825 (O'Connor, J., dissenting) ("the intent-to-kill requirement . . . fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of a crime. Under these circumstances, the determination of the degree of blameworthiness is best left to the sentencer. . . .").[8]

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[8] Additionally, the failure to consider the juvenile's age or overall level of culpability in the mandatory sentencing of juveniles convicted of felony murder only compounds the sentence's unconstitutionality. Petitioner Jackson also presented evidence regarding his home and community environment, which was impoverished, violent and drug-laden. His biological father was absent and his mother's long-time boyfriend was physically abusive; and his mother, brother and several other relatives had been incarcerated. These facts support the conclusion that Jackson did not possess the same moral culpability as an adult when he committed a felony murder at age fourteen. Petition for Writ of Certiorari at 4-5,

Petitioner Miller presented a compelling life history, which supported the presumption that at fourteen he was less morally culpable than an adult. Miller was raised in a tumultuous household in which both parents were substance abusers. He was physically abused by his father. His parents separated when he was ten and he was moved to foster care. When he was just five, Miller attempted to hang himself; by age fourteen, Miller had attempted suicide at least five additional times. He began using drugs and alcohol by age eight, and at the time of the crime he was using prescription drugs, marijuana, and methamphetamines. *See* Petition for Writ of Certiorari at 4-5; *Miller v. State*, No. CR-06-0741, 2010 WL 33377692 (Ala. Crim. App. Aug. 27. 2010). His defense counsel proffered these facts to justify a sentence other than a capital sentence, but these factors were considered only with respect to the elements of the offense because of the mandatory sentencing scheme. In fact, the prosecution mocked evidence of Miller's youth:

> I guess that is the same argument about him being a kid and not responsible. He's not a kid. He's old enough to take a bat and beat somebody to death with it. He's not one of our kids either. I resent that. Parade him up here and try to get you to do something other than what needs to be done because he was fourteen at the time that this

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Jackson v. Norris, No. 09-145, 2011 WL 478600 (Ark. Feb. 9, 2011). *See* Section III, *infra*.

> happened, he is seventeen now and he just doesn't have responsibility for it.

State v. Miller, Trial Tr. at 1320 [hereinafter Miller Tr.]; *see also id.* at 1323. Although these arguments may be constitutionally acceptable when there is discretion in sentencing, *see Eddings v. Oklahoma*, 455 U.S. 104 (1982), such arguments reveal rather than cure the constitutional problem in a mandatory life without parole scheme. To suggest that a sentencing decision should be made on the offenders' trial age rather than at the time of the offense both disregards and denigrates the constitutional principles underlying *Graham* and *Roper*.[9]

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[9] That a sentencer may view youth as a factor indicating increased, rather than diminished, culpability supports a categorical ban on juvenile life without parole sentences. As this Court found in *Roper*:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. . . . In some cases a defendant's youth may even be counted against him. In this very case . . . the prosecutor argued [the defendants'] youth was aggravating rather than mitigating.

543 U.S. at 572-73 (internal citation omitted). Because a sentencer may consider youth a "two-edged sword" – recognising a youth's diminished capacity while simultaneously fearing that the juvenile's young age or troubled upbringing indicates a propensity to reoffend – an unacceptable risk exists that a sentencer will not properly account for a youth's diminished culpability in fashioning an appropriate sentence. *See Penry*, 492 U.S. at 324.

III. THE IMPOSITION OF A LIFE WITHOUT PAROLE SENTENCE ON A JUVENILE WHO DID NOT KILL OR INTEND TO KILL IS IMPERMISSIBLE UNDER THE EIGHTH AMENDMENT

In *Graham*, this Court found that children "who did not kill or intend to kill" have a "twice diminished" moral culpability due to both their age and the nature of the crime. 130 S. Ct. at 2027. This Court further "recognized that defendants *who do not kill, intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* (emphasis added). *Graham*'s rationale applies equally to juveniles convicted of felony murder where there is no allegation or finding of fact that the youth killed or intended to kill.[10]

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[10] Felony murder was first codified in the United States in the nineteenth-century. Guyora Binder, *The Origins of American Felony Murder Rules*, 57 Stan. L. Rev. 59, 64-65 (2004). Initially, felony murder was considered an aggravating factor that might justify the imposition of the death penalty – the fact that the killer had a "felonious motive" increased his overall culpability. Guyora Binder, *The Culpability of Felony Murder*, 83 Notre Dame L. Rev. 965, 978 (2008). The expansion of the felony murder doctrine to include accomplices who did not participate in the act of violence and did not engage in an inherently violent act was more a judicial than legislative expansion. In the twentieth century, courts expanded the scope of accomplice liability and imposed criminal liability even where the connection between the felony and the killing was tenuous. *Id.* at 980. Since felony murder legislation did not itself reflect the broad scope of the doctrine as currently applied, assessing legislative intent and national consensus is difficult.

Graham cited *Enmund v. Florida*, 458 U.S. 782 (1982), for the proposition that individuals who do not kill or intend to kill are categorically less deserving of the most serious forms of punishment than murderers. 130 S. Ct. at 2027. Enmund, like Petitioner Jackson, took part in a robbery in which another participant shot and killed the victims. *Enmund* held:

> For the purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts.

458 U.S. at 801. *Enmund* held that the death penalty "is an excessive penalty for the robber who, as such, does not take a human life." *Id.* at 797.

Similarly, the criminal culpability of a juvenile convicted of felony murder should be limited to the juvenile's personal participation in the underlying felony. With no finding that the juvenile either killed or intended to kill, the juvenile is no more culpable than a juvenile convicted of a nonhomicide felony.

Accordingly, sentencing such juveniles to life without parole is unconstitutional under *Graham*.[11]

A. The Rationale Behind Felony Murder Does Not Justify A Life Without Parole Sentence

The felony murder doctrine requires simply that an offender participated in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or intended that anyone would die. *See, e.g., Lowe v. State*, 2 So.3d 21, 46 (Fla. 2008) ("Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder.") (internal quotation omitted). Felony murder is often justified by a "transferred intent" theory, where the intent to kill may be inferred from an individual's intent to commit the underlying felony since a "reasonable person" would know that death is a possible result of felonious activities. *See, e.g., Commonwealth v. Legg*, 491 Pa. 78, 82 (1980) (finding it proper to infer intent to kill from an intent to commit a felony because, pursuant to a "reasonable man" standard, the person engaged in a felony "knew or should have known that death might result from the felony"). The adult felony murder

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[11] *Graham* also cited *Tison v. Arizona*, 481 U.S. 137 (1987), which upheld the death penalty in an adult felony murder case, for the proposition that "'[t]he heart of the retribution rationale is that a criminal sentence *must be directly related to the personal culpability of the criminal offender*.'" *Graham*, 130 S. Ct. at 2028 (quoting *Tison*, 481 U.S. at 149) (emphasis added). Juveniles convicted of felony murder are less personally culpable than adults because of their age and immaturity.

doctrine is inconsistent with the developmental and neuroscientific research that has informed this Court's recent decisions involving juveniles. These decisions preclude ascribing the same level of anticipation or foreseeability to a juvenile who takes part in a felony – even a dangerous felony – as the law ascribes to an adult. *See J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the "reasonable person" standard does not apply to children).

1. Juveniles' Decision-Making And Risk-Assessment Are Less Developed Than Adults'

Adolescents' risk assessment and decision-making capacities differ from those of adults in ways that are particularly relevant in cases of felony murder. This Court has observed that adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 131 S. Ct. at 2403 (internal quotation omitted). *See also* Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, 18 The Future of Children 15, 20 (2008) [hereinafter Scott & Steinberg, *Adolescent Development*] ("Considerable evidence supports the conclusion that children and adolescents are less capable decision makers than adults in ways that are relevant to their criminal choices.").

Adolescents are also less likely to perceive risks and are less risk-averse than adults. Scott & Steinberg, *Adolescent Development*, at 21. In the

criminal sentencing context, this Court has recognized that adolescents' "'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.'" *Graham*, 130 S. Ct. at 2028 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). In particular, this Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 130 S. Ct. at 2032. *See also* Scott & Steinberg, *Adolescent Development*, at 20. Adolescents are less likely than adults to assess and weigh the risk that someone might get hurt or killed in the course of the felony. Because an adolescent who participates in a felony is less likely to foresee or account for the possibility of death in the course of that felony, a life without possibility of parole sentence is not proportionate to the juvenile's culpability in felony murder cases. *Cf. Tison*, 481 U.S. at 157-58. Accordingly, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life.

2. Juveniles Are Particularly Vulnerable To Negative Influences And Outside Pressures

"[J]uveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id.* Research confirms the common perception that adolescents are highly susceptible to peer pressure. Scott and Steinberg,

Adolescent Development, at 21. In particular, because certain criminal behaviors can heighten status among adolescent peers, youth may face peer pressure to engage in criminal activities that they would otherwise avoid. *Id.* at 20-21.

The influence of peers may be especially significant in felony murder cases, in which there are always accomplices. As with Petitioner Jackson, the youth may make a spur-of-the-moment decision to participate in the felony, perhaps out of fear of social rejection or loss in social status if he refuses. *Id.* at 22. An adolescent participating in a felony is driven more by pressures, impulses and emotion than careful assessment of the risks to himself or others. *Id.*[12] It is unreasonable to infer that that a juvenile had an intent to kill merely based on the juvenile's decision to engage in a felony.

B. Juvenile Life Without Parole Sentences For Felony Murder Serve No Penological Purpose

"A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 130 S. Ct. at 2028. *Graham* held that none of the penological goals of retribution, deterrence, incapacitation, or rehabilitation justified

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[12] Similarly, Petitioner Miller's capital murder conviction relied on the fact that the murder was committed during the course of an arson. *Miller v. State*, 63 So. 3d 676. 683 (Ala. Crim. App. 2010). For the reasons noted above, his actions do not necessarily manifest an intent to kill or an indifference to the value of human life.

a life without parole sentence for a juvenile convicted of a nonhomicide offense. *Id.* at 2028-30. Similarly, none of these penological goals justifies a life without parole sentence on a juvenile convicted of felony murder.

Retribution does not justify a life without parole sentence for a juvenile convicted of felony murder. First, because of juveniles' diminished culpability, "the case for retribution is not as strong [a penological justification] with a minor as with an adult." *Roper*, 543 U.S. at 571. Second, the culpability of an individual convicted of felony murder must be based upon the individual's own conduct and not upon the murder committed by others involved in the felony. *See Enmund*, 458 U.S. at 798 ("The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims."). Because the culpability of a juvenile is based on his own actions – not the resulting harm – where a juvenile convicted of felony murder did not kill or intend to kill, his culpability is no different from a juvenile convicted of a nonhomicide felony.[13] As in *Graham*, retribution cannot justify a life without parole sentence.

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[13] This Court has held that the death penalty can be imposed on an adult convicted of felony murder where the adult was a major participant in the crime and was recklessly indifferent to human life. *Tison*, 481 U.S. at 152. In *Roper* and *Graham*, this Court recognized that youth generally are more reckless than adults, which can result in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569; *Graham*, 130 S. Ct. at 2028. An adolescent's recklessness is not a manifestation of his indifference to human life so much as a reflection of his immaturity and impulsiveness.

Deterrence also fails to justify a life without parole sentence for juveniles convicted of felony murder. In *Enmund*, an adult death penalty case, this Court was "quite unconvinced . . . that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken." 458 U.S. at 798-99. The Court found that "competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." *Id.* at 799. Deterrence is an inappropriate rationale because, "if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious, felony murder will not 'enter into the cold calculus that precedes the decision to act.'" *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)).

Deterrence is an even less compelling rationale for juveniles. Juveniles "are less likely to take a possible punishment into consideration when making decisions." *Graham*, 130 S. Ct. at 2028-29. This Court has questioned whether the prospect of even the death penalty would have "a significant or even measurable deterrent effect on juveniles." *Roper*, 543 U.S. at 571. "[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Id.*

Additionally, *Graham*'s rejection of incapacitation or rehabilitation as a sentencing justification applies equally in felony murder cases. As to incapacitation, this Court found, "[t]o justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable." *Graham*, 130 S. Ct. at 2029. Even expert psychologists cannot differentiate between offenders whose crimes are adolescence-limited and those rare juvenile offenders who will persist with their crimes into adulthood. *Id.* Rehabilitation likewise cannot justify the sentence, since by definition, the sentence "forswears altogether the rehabilitative ideal." *Id.* at 2030.

IV. THE HEIGHTENED RISK OF WRONGFUL CONVICTIONS WEIGHS AGAINST IMPOSING OF LIFE WITHOUT PAROLE SENTENCES ON JUVENILES

This Court struck down the death penalty for mentally retarded offenders because the heightened risk that mentally retarded defendants may falsely confess necessitates a sentence less severe than death. *See Atkins v. Virginia*, 536 at 320-21, n.25 (2002) (citing the increased risk "that the death penalty will be imposed in spite of factors [including the possibility of false confessions] which may call for a less severe penalty."). Like mentally retarded individuals, juveniles have an increased propensity to falsely confess. *See J.D.B.*, 131 S. Ct. at 2401 (the

risk of false confession is "all the more acute" when a juvenile is the subject of a custodial interrogation); *In re Gault*, 387 U.S. 1, 52 (1967) ("[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of 'confessions' by children").

Empirical studies have confirmed that juveniles are particularly likely to confess to crimes they never committed. *See* Joshua A. Tepfer et al., *Arresting Development: Convictions of Innocent Youth*, 62 Rutgers L. Rev. 887, 904 (2010) (wrongfully convicted teenagers and children were almost twice as likely to have falsely confessed than wrongfully convicted adults); Steven A. Drizin & Richard A. Leo, *The Problem of False Confession in the Post-DNA World*, 82 N.C. L. Rev. 891, 945 (2004) (32% of individuals in a dataset of 125 false confessors were under eighteen); Samuel L. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 544-45 (2005) (dataset of 340 exonerations revealed that juveniles were three times more likely to have falsely confessed than adults).[14] Indeed, even the leading interrogation training company, John E. Reid & Associates, has agreed that juveniles are at greater risk of falsely confessing and warn police to use "extreme caution and care" when interrogating them. John E. Reid & Associates, Inc., Critics

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[14] Laboratory studies have reached the same conclusion. *See* Allison D. Redlich & Gail S. Goodman, *Taking Responsibility For an Act Not Committed: Influence of Age and Suggestibility*, 27 L. & Hum. Behav. 141, 150-51 (2003) (majority of juveniles between the ages of twelve and sixteen years old complied with a request to sign a false confession without a word of protest).

Corner: False and Coerced Confessions, http://www.reid.com/educational_info/criticfalseconf.html (last visited Jan. 5, 2012).

Additionally, the overwhelming majority of proven false confessions occur in murder cases that carry the severest sentences, suggesting that the risk of sentencing innocent youth to life without parole may be particularly high. Drizin & Leo, 82 N.C. L. Rev. at 946. Examples abound of the imposition of life without parole sentences on wrongfully convicted youth. *See, e.g.*, Center on Wrongful Convictions of Youth, Calvin Ollins, http://www.cwcy.org/exonereesViewDetail.aspx?id=12 (last visited Jan. 5, 2012); Innocence Project of Florida, Anthony Caravella, http://floridainnocence.org/content/?page_id=2000 (last visited Jan. 5, 2012) (Before his exoneration, Calvin Ollins served more than thirteen years for the murder and rape of a Chicago medical student he falsely confessed to committing when he was fourteen; before exoneration, Anthony Caravella served twenty-six years of his life sentence for a crime he falsely confessed to committing when he was fifteen).

False confessions from juveniles are also apt to result in convictions – even when the defendants are innocent. The *reliability* of confessions is not relevant at the transfer stage, and judges rarely screen out unreliable confessions before trial. *See* Jenny E. Carroll, *Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process*, 61 Hastings L. J. 175, 189-90 (2009). During pre-trial

suppression hearings, judges are tasked only with considering the voluntariness – not the reliability – of inculpatory statements. *See Colorado v. Connelly*, 479 U.S. 157, 161 (1986) ("A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not by the Due Process Clause of the Fourteenth Amendment."). Once the trial commences, jurors give overwhelming weight to confession evidence. *See Miranda v. Arizona*, 384 U.S. 436, 466 (1966) (confessions are "the most compelling possible evidence of guilt"); *Connelly*, 479 U.S. at 182 (Brennan, J., dissenting) ("[t]riers of fact accord confessions such heavy weight in their determinations that the introduction of a confession makes the other aspects of a trial in court superfluous") (internal citations omitted). *Accord* Saul M. Kassin & Katherine Neumann, *On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis*, 21 L. & Hum. Behav. 469 (1997) (laboratory study concluding that confessions are "uniquely potent"); Drizin & Leo, 82 N.C. L. Rev. *supra* (finding that 81% of false confessors who took their cases to trial were wrongfully convicted). Upon conviction, false confessors will almost certainly be sentenced more harshly because their recantations are seen as a lack of remorse. *Id.* at 921.

The net result is that juveniles' "reduced capacity" increases their vulnerability to giving false confessions when pressured by police. *See Atkins*, 536 U.S. at 320-21. This, together with juvenile defendants' added difficulties trusting adults,

working with counsel, and fully appreciating the impact of court procedures all combine to make it more, rather than less, likely that they will receive a wrongfully imposed sentence of life without parole.

In sum, the increased risk that juveniles may falsely confess, coupled with the fact the sentencer will not consider their heightened risk of falsely confessing when imposing life without parole, further supports a categorical bar on sentences of life without parole for juveniles.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court adopt a categorical ban on sentences of life without parole for all juveniles under the age of eighteen.

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Miller v. Alabama and **Jackson v. Hobbs**

Identity of *Amici* and Statements of Interest

APPENDIX

ORGANIZATIONS

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well-being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Alabama Fair Sentencing of Children is a grass roots effort in Alabama working to abolish juvenile life without parole. On May 6, 2009, a bill that would affect our children serving Life and Life Without Parole was introduced in the House of

Representatives by Bobby Scot (D-VA) and John Conyers (D- MI). The name of the bill is HR 2289, the Juvenile Justice Accountability and Improvement Act of 2009. We are working with the coordinating efforts of the National for the Fair Sentencing of Children in Washington, DC to end life without parole, the death sentence in prison, by advocating the passage of this crucial legislation.

The **Barton Child Law & Policy Clinic** is a clinical program of **Emory Law School** dedicated to promoting and protecting the legal rights and interests of children involved with the juvenile court, child welfare and juvenile justice systems in Georgia. The Center achieves its reform objectives through research-based policy development, legislative advocacy, and holistic legal representation for individual clients. The Barton Center's children's rights agenda is based on the belief that policy and law should be informed by research and that legal service to children and families need to be holistic. That basis recognizes that children should be viewed in their social and familial contexts and provided with individualized services to protect their legal rights, respond to their human needs, and ameliorate the social conditions that create risk. The Barton Center adopts an interdisciplinary, collaborative approach to achieving justice for youth.

The Barton Center was founded in March 2000 and has engaged in the legal representation of juveniles in delinquency cases since the summer of 2001. In 2010 the Barton Center added an appellate representation dimension through its Appeal for Youth Clinic, which seeks systemic reform through

the holistic appellate representation of offenders in our juvenile and criminal justice systems.

The **Campaign for the Fair Sentencing of Youth** (CFSY) is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators—on both state and national levels—to accomplish our goal.

The **Campaign for Youth Justice** (CFYJ) is a national organization created to provide a voice for youth prosecuted in the adult criminal justice system. The organization is dedicated to ending the practice of trying, sentencing, and incarcerating youthful offenders under the age of 18 in the adult criminal justice system; and is working to improve conditions within the juvenile justice system. CFYJ

raises awareness of the negative impact of prosecuting youth in the adult criminal justice system and of incarcerating youth in adult jails and prisons and promotes researched-based, developmentally-appropriate rehabilitative programs and services for youth as an alternative. CFYJ also provides research, training and technical assistance to juvenile and criminal justice system stakeholders, policymakers, researchers, nonprofit organizations, and family members interested in addressing the unique needs of youth prosecuted in the adult system.

The Center on Children and Families (CCF) at the University of Florida Fredric G. Levin College of Law in Gainesville, Florida is an organization whose mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinics and Gator TeamChild juvenile law clinic.

The Center for Children's Advocacy (CCA) is a non-profit organization based at the University of Connecticut Law School and is dedicated to the

promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure that children's voices are heard and that children are afforded legal protections everywhere – community, foster placements, educational institutions, justice system and child welfare.

The Center for Children's Law and Policy (CCLP) is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data-driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify

and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Center for Public Representation**, a national public interest law firm with its main office in Northampton, Massachusetts, has represented children and adults with disabilities for nearly forty years. Because a high percentage of individuals in the juvenile and adult correctional systems have mental disabilities, their representation is among the Center's highest priorities. The Center's advocacy efforts have included creating alternatives to incarceration, improving conditions of incarceration and promoting release to appropriate and effective community-based programs.

The **Central Juvenile Defender Center**, a training, technical assistance and resource development project, is housed at the Children's Law Center, Inc. In this context, it provides assistance on indigent juvenile defense issues in Ohio, Kentucky, Tennessee, Indiana, Arkansas, Missouri, and Kansas.

The **Chicago Lawyers' Committee for Civil Rights Under Law, Inc.** is the public interest law consortium of Chicago's leading law firms. The Chicago Lawyers' Committee was established in 1969 by a group of local attorneys to provide quality legal counsel to those clients whose civil rights cases and projects would benefit the community at large. The mission of the Chicago Lawyers' Committee is to promote and protect civil rights, particularly the civil rights of poor, minority, and disadvantaged people in the social, economic, and political systems of our

nation. Problems of high rates of incarceration are a special concern of the Chicago Lawyers' Committee, particularly as those high rates of incarceration adversely effect minority communities. The Lawyers' Committee has recently created an incarceration project devoted to advancing means of reducing levels of incarceration. The Chicago Lawyers' Committee has a special interest in working against those circumstances in which individuals are sentenced in terms of life in prison without the possibility of parole.

The Child Welfare League of America (CWLA) is a coalition of hundreds of private and public child and family service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development and advancement of national standards of care, quality programming, best practices and policies, and collaborative strategies that result in better outcomes for vulnerable children, youth, and families. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. CWLA standards of care for youth recognize that children and adolescents and especially those involved with child welfare and delinquency systems need support that is developmentally and age appropriate. Research shows children and adolescents have less

capacity than adults to take care of themselves and make good decisions. Therefore we advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of its work, CWLA strives to ensure that every child and young person is protected from harm, injustice and discrimination and at all stages of the court process, juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in achieving these goals.

The Children and Family Justice Center (CFJC) is a comprehensive children's law center that has represented young people in conflict with the law and advocated for policy change for over 20 years. In addition to its direct representation of youth and families in matters relating to delinquency and crime, immigration/asylum and fair sentencing practices, the CFJC also collaborates with community members and other advocacy organizations to develop fair and effective strategies for systems reform. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students; they are assisted in their work by the CFJC's fellows, social workers, staff and students.

The Children & Youth Law Clinic (CYLC) is an in-house legal clinic, staffed by faculty and students at the University of Miami School of Law established in 1995. The CYLC serves the legal needs of children and adolescents in abuse and neglect, delinquency, criminal justice, health care,

mental health, disability, independent living, education, immigration and general civil legal matters. The CYLC participates in interdisciplinary research, provides training and technical assistance for lawyers, judges, and other professionals, and produces scholarship and practice materials on the legal needs of children. We have appeared as amicus curiae in numerous federal and state court cases implicating significant due process and therapeutic interests of children in criminal and juvenile justice proceedings.

The CYLC has pioneered the use of "therapeutic jurisprudence" in its advocacy for children in delinquency, criminal, school discipline, dependency, mental health, and other court proceedings. Therapeutic jurisprudence is a field of social inquiry with a law reform agenda, which studies the ways in which legal rules, procedures, and the roles of legal actors produce therapeutic or anti-therapeutic consequences for those affected by the legal process. We believe that courts should recognize the unique developmental characteristics of children, including their immature decision-making abilities, susceptibility to negative external influences, and capability for reform, should assure their fair treatment, and promote their best interests in all legal proceedings where their interests are adjudicated.

The Children's Law Center, Inc. in Covington, Kentucky has been a legal service center for children's rights since 1989, protecting the rights of youth through direct representation, research and policy development and training and education. The

Center provides services in Kentucky and Ohio, and has been a leading force on issues such as access to and quality of representation for children, conditions of confinement, special education and zero tolerance issues within schools, and child protection issues. It has produced several major publications on children's rights, and utilizes these to train attorneys, judges and other professionals working with children.

Children's Law Center of Los Angeles (CLC) is a non-profit public interest law corporation that receives appointments from the Los Angeles County and the Sacramento County dependency courts to serve as counsel for abused and neglected youth. CLC serves as counsel for the vast majority of youth under the jurisdiction of Los Angeles and Sacramento counties. It has been providing children with representation for twenty years, and serves a greater number of children than any other such organization in the country. CLC is also actively engaged in local, statewide and national legislative and other reform efforts.

Founded in 1977, the Children's Law Center of Massachusetts (CLCM) is a private, non-profit legal services agency that provides direct representation and appellate advocacy for indigent children in juvenile justice, child welfare and education matters. CLCM's mission is to promote and secure equal justice and to maximize opportunity for low-income children and youth Further, the CLCM is committed to assuring children's age and developmental factors are considered by decision makers when imposing policies or penalties that impact children's lives. This case presents questions

of significance both to the children who are involved in the justice system and to the attorneys who represent them. The *amici* hope their views will add to the Court's consideration of the issues raised in this appeal.

The Child Welfare League of America (CWLA) is an 89-year-old association of more than 600 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. CWLA knows that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of its work, CWLA strives to ensure that every child and young person is protected from harm, injustice and discrimination and at all stages of the court process, juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in achieving these goals.

The *Civitas* ChildLaw Center is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its Child and Family Law Clinic, the ChildLaw Center also routinely provides representation to child clients in juvenile delinquency, domestic relations, child protection, and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court-involved youth.

The Colorado Juvenile Defender Coalition (CJDC) is a non-profit organization dedicated to excellence in juvenile defense and advocacy, and justice for all children and youth in Colorado. A primary focus of CJDC is to reduce the prosecution of children in adult criminal court, remove children from adult jails, and reform harsh prison sentencing laws through litigation, legislative advocacy, and community engagement. CJDC works to ensure all children accused of crimes receive effective assistance of counsel by providing legal trainings and resources to attorneys. CJDC also conducts nonpartisan research and educational policy campaigns to ensure children and youth are constitutionally protected and treated in developmentally appropriate procedures and settings. Our advocacy efforts include the voices of affected families and incarcerated children.

The Defender Association of Philadelphia is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to the ideal of high quality legal services for indigent criminal defendants. Today some two hundred and fifteen full time assistant defendants represents clients in adult and juvenile, state and federal, trial and appellate courts, and at civil and criminal mental health hearings as well as at state and county violation of probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly, Association attorneys represent juveniles charged with homicide. Life imprisonment without the possibility of parole is the only sentence for juveniles found guilty in adult court of either an intentional killing or a felony murder. The Defender Association attorneys have had numerous juveniles given sentences of life imprisonment without parole. The constitutionality of such sentences has been challenged at the trial level and at the appellate level by Defender Association lawyers.

The Disability Rights Legal Center (DRLC) is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with

Disabilities Education Improvement Act and other federal and state laws. Its mission is to champion the rights of people with disabilities through education, advocacy and litigation. The DRLC is a recognized expert in the field of disability rights, and regularly files amicus briefs in state and federal courts, and is involved in policy-making activities on behalf of persons with disabilities both statewide and nationally. For example, DRLC filed an amicus brief on the merits at the United States Supreme Court in the cases of *Cullen v. Pinholster*, 131 S.Ct. 1388 U.S. (2011), addressing the impact of disability on the death penalty phase of a criminal matter, and *Graham v. Florida*, 130 S.Ct. 2011 (2010), on the issue of whether disability should be considered in charging and sentencing of minor youths charged as adults. DRLC also filed an amicus brief on the merits at the United States Supreme Court in *Forest Grove Sch. Dist. v. T. A.*, 129 S. Ct. 2484 (2009), on the issue of whether the Individuals with Disabilities Education Act allows reimbursement for private school placement without prior receipt of special education service, and in *Goodman v. Georgia*, 126 S. Ct. 877 (2005), a case addressing the issue of whether Congress properly abrogated state sovereign immunity when enacting Title II of the Americans with Disabilities Act.

The Education Law Center - PA is a public-interest organization dedicated to ensuring that all Pennsylvania children have access to a quality public education. ELC-PA has 35 years of experience addressing the educational needs of children, including many who have also been involved with the juvenile justice system. We seek to participate as

amicus in order to explain why, in our view, the fair treatment of children requires individualized consideration rather than the application of inflexible rules.

Families & Allies of Virginia's Youth (FAVY) is a diverse statewide organization that works to improve life outcomes for youth who are involved in — or who are at risk of being involved in — Virginia's justice systems. FAVY informs and supports families and youth who encounter the justice system. FAVY also advocates for justice system reforms, especially equitable, age-appropriate, and rehabilitative treatment of youth in the justice system. FAVY's membership includes people from throughout the commonwealth of Virginia — mostly family members of young people in the justice system, along with concerned community members and advocates.

Fight for Lifers, West is a Lifers Support Group in Western Pennsylvanian devoted to Prisoners in Pennsylvania who are sentenced to Life Imprisonment Without Parole. In the years since Roper, FFLW has identified 481 Juvenile Lifers in the PADOC, revealing that Pennsylvania leads the world in this category. We have sent 36 Newsletters, one every two months to these Juvenile Lifers, helping to make these prisoners aware of each other and giving important information to them. I this way they have shared information with each other, and made an impact of the outside world. FFLW has been seriously involved in the PA Senate Judiciary Committee Public Hearing on Juvenile Lifers, September 22, 2008, and in the United States House

Subcommittee on Crime and Terrorism and Homeland Security hearing on H.R. 2289-- Juvenile Justice Accountability and Improvement Act of 2009--, on June 9, 2009. FFLW was included in an Amicus Brief filed by the Juvenile Law Center in Graham v. Florida in 2009.

Florida's Children First ("FCF") is Florida's preeminent legal advocacy organization dedicated to the legal rights of children in the state's care and custody. Our mission is to advance the rights of at-risk children and youth. We seek full representation of children and youth and meaningful and sustainable improvement in Florida's child-serving systems. Our work is comprised of public policy development, executive branch monitoring, training and technical assistance, public awareness, and, where necessary, strategic litigation.

Human Rights Watch is a non-governmental organization established in 1978 to monitor and promote observance of internationally recognized human rights. It has Special Consultative Status at the United Nations, regularly reports on human rights conditions in the United States and more than seventy other countries around the world, and actively promotes legislation and policies worldwide that advance protections of domestic and international human rights and humanitarian law. Human Rights Watch has investigated life without parole sentences for youth in the United States since 2004. Its reports on this subject include *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (a 2005 report on juveniles sentenced to life without parole throughout the

United States); *Thrown Away* (a 2005 report on life without parole for juveniles in Colorado); and *When I Die They'll Send Me Home* (a 2008 report on life without parole for juveniles in California).

International CURE (Citizens United for Rehabilitation of Errants) is a grassroots prison reform organization that advocates for more rehabilitative opportunities for people incarcerated. These opportunities must especially be given to *all* juveniles. Life without parole sentences for juveniles in effect closes the door to rehabilitation by (1) providing no release no matter how much a person is rehabilitated and (2) transferring that person into the adult system.

The **Iowa Chapter** of Citizens United for the **Rehabilitation of Errants (CURE)** was established in 1992 and is a member organization of International CURE. We are committed to working for justice and protection of human rights within our criminal justice system. We believe that children should be treated and processed within the juvenile justice system rather than in the adult courts. We believe that the justice system should recognize developmental differences between adults and children. We also believe that it is cruel and unusual treatment to sentence children to a sentence of life without parole which denies them the opportunity for rehabilitation and redemption.

The **John Howard Association of Illinois** provides critical public oversight of Illinois' prisons, jails, and juvenile correctional facilities. As it has for more than a century, the Association promotes fair,

humane, and effective sentencing and correctional policies, addresses inmate concerns, and provides Illinois citizens and decision-makers with information needed to improve criminal and juvenile justice.

JustChildren, a project of the Legal Aid Justice Center, with offices in Charlottesville, Richmond, and Petersburg, is Virginia's largest children's law program. We work to reform Virginia's juvenile justice system in such areas as access to counsel, conditions of confinement, juvenile reentry, and juvenile transfer. JustChildren's goal is to keep more children in school, off the streets, and out of courts and prisons. In 2005, we helped to pass a law requiring counsel for youth at their initial detention hearings. We currently lead a statewide legislative campaign to reduce the number of youth who are tried and sentenced as adults. JustChildren also represents youth in juvenile prisons seeking access to more appropriate services and youth tried as adults, who have blended sentences of juvenile and adult time, to obtain reduction or elimination of the adult time. Working with these youth, many of whom have been convicted of serious felonies, we see how rehabilitation can transform a youth's behavior and attitude. Boys and girls involved in extensive dangerous behaviors have matured, turned their lives around, and persuaded Virginia judges that they no longer need to serve lengthy adult sentences.

The **Justice for Children Project** is an educational and interdisciplinary research project housed within The Ohio State University Michael E. Moritz College of Law. Begun in January 1998, the

Project's mission is to explore ways in which the law and legal reform may be used to redress systemic problems affecting children. The Justice for Children Project has two primary components: original research and writing in areas affecting children and their families, and direct legal representation of children and their interests in the courts. Through its scholarship, the Project builds bridges between theory and practice by providing philosophical support for the work of children's rights advocates. By its representation of individual clients through the Justice for Children Practicum and through its amicus work, the Justice for Children Project strives to advance the cause of children's rights in delinquency, status offense, abuse, neglect, and other legal proceedings affecting children's interests.

The Juvenile and Special Education Law Clinic (JSELC) is one of eight clinics at the U.D.C. David A. Clarke School of Law. JSELC faculty and student attorneys represent children and parents (or guardians) in Washington, DC primarily in special education and school discipline matters, with a focus of advocating on behalf of young people who also are enmeshed in the delinquency or criminal systems. JSELC protects and enforces students' and parents' (or guardians') rights in administrative hearings, as well as in local and federal court. JSELC has its roots in representing youth in the delinquency system. JSELC faculty pioneered a nationally-recognized approach of addressing delinquency problems by supplementing delinquency defense with, in appropriate cases, advocacy to address the education and special education needs of the children

who are the subject of those delinquency proceedings. By arranging for young people to receive needed special education services, JSELC professors and law students ensure that delinquency system judges, probation officers, and others respond appropriately to the children's needs for care and rehabilitation. As a consequence, JSELC faculty and the clinic are often able to protect children from punitive responses or to extricate children from the delinquency system altogether.

Juvenile Justice Initiative (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our mission is to transform the juvenile justice system in Illinois by reducing reliance on confinement, enhancing fairness for all youth, and developing a comprehensive continuum of community-based resources throughout the state. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system

Juvenile Justice Project of Louisiana (JJPL) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and identify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system-wide reform and increased resources for juvenile public defenders.

The Juvenile Rights Advocacy Project (JRAP) is curricular law clinic, based at Boston College Law School since 1995. JRAP represents youth, with a focus on girls, who are in the delinquency or status offense systems, across systems and until the youth reach majority. JRAP attorneys use legal system to access social services and community supports for youth, hold systems accountable, and reduce the use of incarceration. JRAP also conducts research and policy advocacy for youth in the justice system. Among its work, JRAP

seeks to develop and model programs for delinquent girls that reduce the use of incarceration and detention, and prompt systems to work collaboratively to shore up community resources supporting youth.

The Kids First Law Center is a nonprofit public interest organization for children in Cedar Rapids, Iowa. Kids First opened in January 2005 and provides free legal counsel to children in high-conflict custody and divorce cases. Kids First focuses on the needs and rights of children placed in the middle of conflict. The organization strives to make children's voices heard in the court system. We believe judges and attorneys should seek to understand situations from the child's perspective. Because of their developmental stages and comprehension abilities, children should be treated differently than adults in the court system.

Loyola Law School Center for Juvenile Law and Policy (CJLP) is an organization dedicated to reforming the Los Angeles juvenile justice system through research, activism, and advocacy. Through direct client representation, community involvement, and policy research and advocacy, the Center provides a voice for children and families involved in the Juvenile Justice System, and a point of convergence for students, faculty, stakeholders, and community members dedicated to the creation of a more humane and responsive justice system for children. CJLP has written and participated in numerous amicus briefs

The **Mid-Atlantic Juvenile Defender Center (MAJDC)** is one of nine regional centers created by the National Juvenile Defender Center in 2000. MAJDC is a multi-faceted juvenile defense resource center serving the District of Columbia, Maryland, Puerto Rico, Virginia and West Virginia. We are committed to working within communities to ensure excellence in juvenile defense and promote justice for all children. MAJDC promotes policy development in the region through conducting state based assessments of access to counsel and quality of representation in delinquency proceedings. MAJDC also coordinates training programs for defenders, provides technical assistance and encourages the development of oversight and accountability in the justice system.

NAMI, the National Alliance on Mental Illness, is the nation's largest grassroots mental health organization dedicated to building better lives for the millions of Americans affected by mental illness. NAMI advocates for access to services, treatment, support and research and is steadfast in its commitment to raising awareness and building a community of hope for individuals living with mental illnesses across the lifespan. NAMI has long prioritized advocacy on behalf of youth with mental health disorders in criminal justice systems, many of whom have mental illnesses so severe that they interfere with daily functioning. We believe that it is cruel and inappropriate to sentence individuals who commit crimes while they are youth to life without parole and further believe that both age and mental health status must be strongly considered as mitigating factors in such cases.

The National Association of Counsel for Children (NACC) is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal services to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resources center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs involving the legal interest of children in state and federal appellate courts and the Supreme Court of the United States.

Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals

include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the *amicus curiae* program. Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children and their families in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. *Amicus* cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 3000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The National Black Law Student Association (NBLSA) is a national organization formed to articulate and promote the needs and goals of black law students and effectuates change in the legal community. We are currently the largest student run organization in the United States with nearly 6,000 members. The NBLSA has a special interest in protecting youthful offenders in the

juvenile system. NBLSA created The Juvenile Education Advocacy Network ("J.E.A.N"). J.E.A.N targets youth at risk of obtaining juvenile records, and pairs these youths with local BLSA chapters that focus on juvenile delinquency prevention. In addition, NBLSA has initiated a community service program focused on criminal justice reform that addresses the needs of juveniles at every level. Such community service programs include Criminal Justice Reform; early prevention, successful reentry, and the incarcerated population.

The National Center for Youth Law (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. As part of the organization's juvenile justice agenda, NCYL works to ensure that youth in trouble with the law are treated as adolescents and not

adults, in a manner that is consistent with their developmental stage and capacity to change.

The National Family Network (NFN) works to create a community of support for friends and family members of people impacted by violence committed by youth, in order to establish a strong, family-run, advocacy base. The NFN works to organize and mobilize family members and loved ones in order to engage in dialogue, advocacy, action planning, and information sharing to advance efforts to end the practice of sentencing youth to life in prison without the possibility of parole. We are the family and friends of those impacted by violence. We are focused on healing and restorative practices in place of extreme sentencing practices imposed on youth.

The National Juvenile Defender Center was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in

urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The mission of the National Juvenile Justice Network (NJJN) leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-one members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner focused on their rehabilitation. Youth should not be transferred into the punitive adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and are exposed to serious, hardened criminals. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development

The New Jersey Institute for Social Justice (NJISJ) is a Newark-based non-partisan

research and advocacy organization dedicated to the advancement of New Jersey's urban areas and residents. NJISJ advances its agenda through policy-related research and analysis, development and implementation of model programs, advocacy efforts, operational partnerships with government, and public education. The Institute has a deep and longstanding commitment to juvenile justice. The Institute played a central role in bringing the Juvenile Detention Alternatives Initiative to New Jersey, where it is now statewide and has resulted in many thousands fewer pretrial detentions of juveniles, which have long term harmful effects, with no increase in either pretrial re-offense or court non-appearance rates. The Institute has served since its inception on the New Jersey Council for Juvenile Justice System Improvement, a body jointly established by the Acting Administrative Director of the New Jersey Courts and the Executive Director of the State Juvenile Justice Commission.

The mission of the North Carolina Office of the Juvenile Defender can be described in four parts: to provide services and support to defense attorneys, to evaluate the current system of representation and make recommendations as needed, to elevate the stature of juvenile delinquency representation, and to work with other juvenile justice actors to promote positive change in the juvenile justice system. The Office of the Juvenile Defender is interested in this case as it impacts the constitutional rights of juveniles, particularly those juveniles facing life sentences without the possibility of parole.

The **Northeast Juvenile Defender Center** is one of the nine Regional Centers affiliated with the National Juvenile Defender Center. The Center provides support to juvenile trial lawyers, appellate counsel, law school clinical programs and nonprofit law centers to ensure quality representation for children throughout Delaware, New Jersey, New York, and Pennsylvania by helping to compile and analyze juvenile indigent defense data, offering targeted, state-based training and technical assistance, and providing case support specifically designed for complex or high profile cases. The Center is dedicated to ensuring excellence in juvenile defense by building the juvenile defense bar's capacity to provide high quality representation to children throughout the region and promoting justice for all children through advocacy, education, and prevention.

The **Northwestern University School of Law's Bluhm Legal Clinic** has represented poor children in juvenile and criminal proceedings since the Clinic's founding in 1969. The **Children and Family Justice Center (CFJC)** was established in 1992 at the Clinic as a legal service provider for children, youth and families and a research and policy center. Six clinical staff attorneys currently work at the CFJC, providing legal representation and advocacy for children in a wide variety of matters, including in the areas of juvenile delinquency, criminal justice, special education, school suspension and expulsion, immigration and political asylum, and appeals. CFJC staff attorneys are also law school faculty members who supervise second- and third-year law students in the legal and

advocacy work; they are assisted in this work by the CFJC's social worker and social work students.

The **Pacific Juvenile Defender Center** is a regional affiliate of the National Juvenile Defender Center. Members of the Center include juvenile trial lawyers, appellate counsel, law school clinical staff, attorneys and advocates from nonprofit law centers working to protect the rights of children in juvenile delinquency proceedings in California and Hawaii. The Center engages in appellate advocacy, public policy and legislative discussions with respect to the treatment of children in the juvenile and criminal justice systems. Center members have extensive experience with cases involving serious juvenile crime, the impact of adolescent development on criminality, and the differences between the juvenile and adult criminal justice systems. These cases, involving the imposition of Life Without the Possibility of Parole on juvenile offenders, present questions that are at the core of the Pacific Juvenile Defender Center's work.

The **Pendulum Foundation** serves youth who are serving long prison sentences, particularly those serving life without parole. In our capacity as a 501c3, The Pendulum Foundation educates both the public and those former juveniles inside the prison system. We have been featured in local, regional, national and international media. We provide college scholarships, programs, books and support for our incarcerated young men and women. In our capacity as Pendulum Juvenile Justice, a 501c4, we worked with the Colorado legislature to lower life without parole sentences for juveniles, soften direct file

statutes and create the first juvenile clemency board in the United States

For 225 years the **Pennsylvania Prison Society** has advocated for a restorative and constructive correctional system – one that is rooted in fairness and premised on society's needs to hold offenders accountable for their offenses and to aim to make them less likely to commit additional crimes once they are released. Sentences of life without parole strip away all hope of transformation and are, therefore, fundamentally inhumane as well as excessively cruel. Imposing such a terminal sentence on a child is additionally unfair in failing to take into account the diminished mental and emotional capacities of youthful offenders.

The **Public Defender Service for the District of Columbia (PDS)** is a federally funded, independent public defender organization; for 50 years, PDS has provided quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia justice system. PDS provides legal representation to many of the indigent children in the most serious delinquency cases, including those who have special education needs due to learning disabilities. PDS also represents classes of youth, including a class consisting of children committed to the custody of the District of Columbia through the delinquency system.

Based in one of our nation's poorest cities, the **Rutgers School of Law – Camden Children's Justice Clinic** is a holistic lawyering program using multiple strategies and interdisciplinary approaches

to resolve problems for indigent facing juvenile delinquency charges, primarily providing legal representation in juvenile court hearings. While receiving representation in juvenile court and administrative hearings, clients are exposed to new conflict resolution strategies and be educated about their rights and the implications of their involvement in the juvenile justice system. This exposure assists young clients in extricating themselves from destructive behavior patterns, widen their horizons and build more hopeful futures for themselves, their families and their communities. Additionally, the Clinic works with both local and state leaders on improving the representation and treatment of at-risk children in Camden and throughout the state.

Rutgers Urban Legal Clinic (ULC), The ULC is a clinical program of Rutgers Law School – Newark, established more than thirty years ago to assist low-income clients with legal problems that are caused or exacerbated by urban poverty. The Clinic's Criminal and Juvenile Justice section provides legal representation to individual clients and undertakes public policy research and community education projects in both the juvenile and criminal justice arenas. ULC students and faculty have worked with the New Jersey Office of the Public Defender, the New Jersey Institute for Social Justice, the Essex County Juvenile Detention Center, Covenant House – New Jersey, staff of the New Jersey State Legislature, and a host of out-of-state organizations on a range of juvenile justice practice and policy issues. The ULC is a team leader of the New Jersey Juvenile Indigent Defense Action Network, an initiative of the John D. and

Catherine T. MacArthur Foundation that, among other efforts, seeks to provide post-dispositional legal representation to young people committed to the New Jersey Juvenile Justice Commission.

The **Sentencing Project** is a 25-year old national non-profit organization engaged in research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system, and for developing recommendations for policy and practice to ameliorate these problems. The Sentencing Project has produced policy analyses that document the increasing use of sentences of life without parole for both juveniles and adults, and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Staff of the organization are frequently called upon to testify in Congress and before a broad range of policymaking bodies and practitioner audiences.

The **Southern Juvenile Defender Center** is one of nine regional centers created by the National Juvenile Defender Center (NJDC) to enhance the juvenile defense bar's capacity to provide high quality representation. The Southern Juvenile Defender Center offers technical assistance and advice to juvenile defenders, facilitates networking opportunities for juvenile defenders, conducts state and regional trainings and gathers and analyzes juvenile indigent defense data. The Southern Juvenile Defender Center is interested in this case as it impacts the constitutional rights of juveniles,

particularly those juveniles facing life sentences without the possibility of parole.

The **Support Center for Child Advocates** (*Child Advocates*), founded in 1977, is Philadelphia's volunteer lawyer program for abused and neglected children in Philadelphia, representing 800 children each year. For the children committed to *Child Advocates* care, lawyers and social workers advocate to ensure safety, health, education, family, permanency and access to justice. Respected for diligent and effective advocacy through a "whole child" model of representation, *Child Advocates* moves both public systems to deliver entitled services and private systems to open their doors to needy children and their families. Like all young people, *Child Advocates'* clients have distinct physical, emotional and developmental needs, however, the added background of abuse and neglect further impacts their development and behavior. *Child Advocates* strives to make certain that the individual circumstances of its young clients are taken into consideration by the Courts, public agencies and other decision-makers in the child's life.

The **University of Michigan Law School Juvenile Justice Clinic** (JJC) is a live client clinic that represents juveniles charged with criminal and delinquent conduct in various courts in the State of Michigan. The JJC represents approximately 30 clients at any given time. Additionally, JJC students and faculty work on juvenile justice policy issues.

Voices for Georgia's Children is an independent, non-profit organization whose mission

is to substantially improve outcomes for Georgia's children by engaging lawmakers and the public into building a sustained, comprehensive, long-term agenda to impact the lives of our kids in five distinct areas: health, safety, education, connectedness and employability. Through advocacy, original research and analysis, Voices assists leaders and citizens of Georgia in making sound decisions on policy, investment and systems that serve children and youth.

The W. Haywood Burns Institute (BI) is a San Francisco-based national nonprofit organization with a mission to protect and improve the lives of youth of color, poor youth and the well-being of their communities by reducing the adverse impacts of public and private youth-serving systems to ensure fairness and equity throughout the juvenile justice system. BI works with local juvenile justice systems to reduce racial and ethnic disparities in the juvenile justice system. Using a data driven, consensus based approach, BI works in sites across the country to bring officials from law enforcement, legal systems and child welfare together with community leaders, parents and children to change policies, procedures and practices that result in the detention of low-offending youth of color and poor youth. In addition, through the Community Justice Network for Youth, BI supports local organizations to build their capacity to hold local juvenile justice systems accountable, reduce the overuse of detention, and promote the use of community alternatives to detention. The BI has worked in more than 40 jurisdictions nationally and achieved significant results in reducing racial and ethnic disparities.

The Wisconsin Council on Children and Families (WCCF) was established in 1881 and has continued to the present time, through research, policy analysis, and education to promote policies and investments to ensure that all children grow up in safe, healthy, and nurturing families and communities. As a multi-issue advocacy organization, WCCF has been engaged in promoting policies that ensure youthful offenders receive effective developmentally appropriate responses and interventions at all stages of the juvenile and criminal justice system. WCCF has been particularly active in promoting policies that ensure youth are not treated as adults and that the unique developmental differences between adults and juveniles are attended to. WCCF believes, based on sound research, that use of developmentally appropriate interventions for youthful offenders accomplishes both the primary goals of the justice system, namely reducing the likelihood of further community harm and promoting the youth's success in becoming a productive member of our community.

Youth Advocate Programs, Inc. (YAP) is a non-profit, direct services organization founded in 1975. Our mission is to provide individuals who are, have been or may be subject to compulsory care with the opportunity to develop, contribute and be valued as assets so that communities have safe, proven effective and economical alternatives to institutional placement. Our philosophy stems from the premise that every individual and family has strengths and capabilities that can and must be developed. Our core agency principles guide this premise into practice and the principles reflect the agency's

ongoing commitment to family-focused programming that empowers youth and families to lead healthy, safe and productive lives in their communities. We recognize that strong families make strong communities and strong children, and oppose the incarceration of youth. YAP serves over 12,000 youth and families per year, specializing in youth who are typically rejected by government and other service providers because they present the most challenging cases. The agency provides child welfare, mental health and juvenile justice systems with cost-effective alternatives to residential, correctional and other out-of-home placements.

The Youth Law Center is a San Francisco-based national public interest law firm working to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases in California and two dozen other states. The Center's attorneys are often consulted on juvenile policy matters, and have participated as amicus curiae in cases around the country involving important juvenile system issues. Youth Law Center attorneys have written widely on a range of juvenile justice, child welfare, health and education issues, and have provided research, training, and technical assistance on legal standards and juvenile policy issues to public officials in almost every State. The Center has long been involved in public policy discussions, legislation and court challenges involving the treatment of juveniles as adults. Center attorneys were consultants in the John D. and Catherine T. MacArthur Foundation project on adolescent

development, and have recently authored a law review article on juvenile competence to stand trial. The imposition of life without parole sentences upon fourteen year-olds is an issue that fits squarely within the Center's long-term interests.

INDIVIDUALS

Mary Berkheiser is a Professor of Law at the William S. Boyd School of Law, University of Nevada, Las Vegas. Professor's Berkheiser's area of specialization is juvenile law and the rights of juveniles accused of committing crimes. Professor Berkheiser directs the Juvenile Justice Clinic in the law school's Thomas & Mack Legal Clinic and teaches Criminal Law and Criminal Procedure - Adjudication. In the clinic, law students are certified to practice law before the courts of the State of Nevada under the supervision of Professor Berkheiser. Those students represent juveniles in proceedings in the juvenile and state district courts, advocating for their legal rights and their expressed interests. In addition, Professor Berkheiser and her students have drafted legislation and testified at legislative hearings on matters affecting juveniles in the State of Nevada. Professor Berkheiser is the co-director of the Western Juvenile Defender Center and a member of the Clark County Juvenile Justice Administration's Juvenile Detention Alternatives Initiative (JDAI) team and of the JDAI Girls Initiative Workgroup. Professor Berkheiser has authored two articles on juvenile issues – *Capitalizing Adolescence: Juvenile Offenders on*

Death Row, 59 Miami L. Rev. 135 (2005), and *The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts*, 54 Fla. L. Rev. 577 (2002) – and is at work on a third article that critiques juvenile plea bargaining.

Shay Bilchik is the founder and Director of the Center for Juvenile Justice Reform at Georgetown University Public Policy Institute. The Center's purpose is to focus the nation public agency leaders, across systems of care and levels of government, on the key components of a strong juvenile justice reform agenda. This work is carried out through the dissemination of papers on key topics, the sponsorship of symposia, and a Certificate Program at Georgetown providing public agency leaders with opportunities for short, but intensive, periods of study. Prior to joining the Institute on March 1, 2007, Mr. Bilchik was the President and CEO of the Child Welfare League of America, a position he held from February of 2000. Shay led CWLA in its advocacy on behalf of children through his public speaking, testimony and published articles, as well as collaborative work with other organizations. He worked closely with the CWLA Board of Directors, staff, and its public and private agency members on issues impacting the well-being of children and families. In 2001, 2004, 2005 and 2006, he was named among The NonProfit Times Power and Influence Top 50 for making his mark in the public policy arena and championing child welfare issues. Prior to his tenure at CWLA, Shay headed up the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in the U.S. Department of Justice, where he advocated for and

supported a balanced and multi-systems approach to attacking juvenile crime. Before coming to the nation's capital, Mr. Bilchik was an Assistant State Attorney in Miami, Florida from 1977-1993, where he served as a trial lawyer, juvenile division chief, and Chief Assistant State Attorney. Mr. Bilchik earned his B.S. and J.D. degrees from the University of Florida. As a former prosecutor and U.S. Department of Justice official in charge of juvenile justice and delinquency prevention issues he has learned that overly punitive sentencing policies do not work to either make our communities safe or rehabilitate offenders. In fact, research on juvenile offending, sentencing of juveniles as adult offenders, and adolescent brain development teach us that these disproportionate responses actually exacerbate juvenile offending patterns. JLWOP is a prime example of this simplistic thinking and ineffective public policy - a policy that is not shared by any developed country in the world.

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is president of the board for the North Carolina Center on Actual Innocence and has been appointed

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
FEB 21 2012
OFFICE OF THE CLERK

Nos. 10-9646 and 10-9647

In the Supreme Court of the United States

EVAN MILLER, PETITIONER
v.
ALABAMA

KUNTRELL JACKSON, PETITIONER
v.
RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION

ON WRITS OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF ALABAMA
AND
THE SUPREME COURT OF ARKANSAS

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN, EIGHTEEN (18) OTHER STATES, AND ONE (1) TERRITORY FOR RESPONDENTS

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QUESTIONS PRESENTED

Miller v. *Alabama*, No. 10-9646

1. Does the Eighth Amendment categorically bar governments from imposing life-without-parole sentences on persons who commit aggravated murder when they are 14 years old?

2. If the Eighth Amendment does not categorically bar governments from imposing life-without-parole sentences on these offenders, does it nevertheless require governments to exempt these offenders from statutes that, for the worst forms of murder, make life without parole the minimum sentence?

Jackson v. *Hobbs*, No. 10-9647

1. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender?

2. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a life-without-parole sentence on a 14-year-old homicide offender who was not the triggerman or shown to have intended the killing, but who acted with reckless indifference to human life?

3. Do the Eighth and Fourteenth Amendments to the United States Constitution prohibit the imposition of a mandatory life-without-parole sentence on a 14-year-old homicide offender?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The Court should not lightly disturb the sovereign authority that states exercise over their discrete criminal-justice systems. 4

II. The Court should not cut short the democratic process that already is playing out in state capitals regarding the propriety of LWOP sentences for teenager murderers. 6

III. The Court should be cautious before using international law to shed light on "national" consensus. 8

A. Considering foreign policies distracts from the relevant Eighth Amendment considerations 9

B. Foreign governments have different policies and agendas that cannot be captured in sentencing data. 11

IV. The Court should decline to use a categorical ban on a term-of-years sentence involving the crime of murder. 13

V. The Court should not categorically prohibit LWOP sentences for teenage murderers. 17

A. There is no "national consensus" regarding sentencing for teenage murderers. 17

B. Petitioners' sentences are not grossly disproportionate to their offenses. 20

CONCLUSION 24

TABLE OF AUTHORITIES

Page

Cases

Atkins v. *Virginia*,
536 U.S. 304 (2002) 11, 17

Graham v. *Florida*,
130 S. Ct. 2011 (2010) ..... passim

Gregg v. *Georgia*,
428 U.S. 153 (1976) 9

Harmelin v. *Michigan*,
501 U.S. 957 (1991) 5, 20, 21, 23

Irvine v. *California*,
347 U.S. 128 (1954) 4

J.D.B. v. *North Carolina*,
131 S. Ct. 2394 (2011) 16

Oregon v. *Ice*,
555 U.S. 160 (2009) 4

Patterson v. *New York*,
432 U.S. 197 (1977) 4

Penry v. *Lynaugh*,
492 U.S. 302 (1989) 17

Roper v. *Simmons*,
543 U.S. 551 (2005) ..... passim

Schooner Exchange v. *McFaddon*,
11 U.S. 116 (1812) 8

State v. *Ninham*,
797 N.W.2d 451 (Wis. 2011) 21, 22

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356 U.S. 86 (1958) 9, 12

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Craig Whitlock, Friend of 9/11 Hijackers Convicted in Germany, Wash. Post, Aug. 20, 2005, at A12..... 9

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Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty – Comparative Aspects, Juvenile Justice Systems in Europe – Current Situation and Reform Developments* 1772 (2010)..... 12

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Constitutional Provisions

U.S. Const. amend. XIV ..... passim

INTEREST OF *AMICI CURIAE*

As independent sovereigns, the states routinely exercise law enforcement authority, serving as the principal guardians of community safety. The vast majority of criminal prosecutions in this country occur in state court and under state sentencing laws. And, except as constrained by this Court's Eighth Amendment jurisprudence, the state legislatures generally are free to determine which punishment is most appropriate to vindicate justice, deter others from committing crime, and ensure that the perpetrator is unable to reoffend. This is the role of the states.

In determining whether a particular penalty violates the Eighth Amendment, this Court seeks to determine "whether there is a national consensus" against the practice at issue. *Graham* v. *Florida*, 130 S. Ct. 2011, 2022 (2010). The states have a manifest interest in this inquiry as it relates to the constitutionality of life-without-parole sentences for the country's most violent teenagers. Among the 50 states, 38 follow the federal practice of allowing those 14 years and older to be given life-without-parole sentences. In fact, 26 states make the punishment mandatory in at least some cases. As a result, this Court's imposition of a categorical ban would have the immediate effect of overturning federal law and the sentencing practices of more than three-quarters of the states. This Court should not casually set aside state sovereignty and sentencing authority, particularly in a controversial area that is still subject to considerable national dialogue and debate.

INTRODUCTION AND SUMMARY OF ARGUMENT

The issues presented in this case are narrowly framed to address the constitutionality of life-without-parole (LWOP) sentences for teenage murderers.[1] But those issues raise additional questions of much broader jurisprudential significance to the states as co-equal sovereigns: Should this Court create yet another categorical rule that removes states' sovereign authority to determine the propriety of non-capital sentences? Does such categorical rulemaking reflect appropriate separation-of-powers and democratic policy-making principles? And does international law have any role to play in determining a "national" consensus of what is cruel and unusual?

The *amici* states answer those questions and advance the following distinct points in support of the State of Alabama and the State of Arkansas:

First, this Court has recognized that administration of the criminal justice system is one of the most basic sovereign prerogatives that states retain. This Court should be reluctant to create categorical rules that eliminate entirely the states' sovereign authority to establish certain sentencing practices.

Second, judicial reluctance to circumscribe state sovereignty should be at its apex when doing so cuts short a vigorous and democratic process that already is playing out in state legislatures. This democratic principle is bigger than the fact that three-quarters of the states currently follow the federal practice of

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[1] The term "murderers" includes accomplices to murders.

allowing LWOP sentences for teenage murderers. It recognizes that this Court disrupts the democratic process and deprives society of the opportunity to reach true "consensus" when it prematurely ends valuable public debate over this moral issue. This Court should not silence one side and declare the other the winner. Rather than reflecting democratic principles, such a ruling would stultify them.

Third, in evaluating "national" consensus, *Graham* v. *Florida*, 130 S. Ct. 2011, 2022 (2010), this Court should be extraordinarily cautious before looking to international law and trends, particularly when the United States as a whole has been a conscientious objector to those trends. While international-law principles may have a more vital role to play in other areas, their legitimacy is much weaker in an Eighth Amendment analysis. To the extent *Graham* and *Roper* v. *Simmons*, 543 U.S. 551 (2005), hold otherwise, they should not be extended to teenage murderers.

Fourth, the Court should be equally cautious about extending *Graham* to categorically ban term-of-years sentences in the context of a murder offense. Murder is different than property and other nonhomicide crimes. And notwithstanding broad stereotypes about teenage immaturity and impulsiveness, some teenage murders reflect such utter depravity of will that an LWOP sentence is the only appropriate punishment.

Finally, there is no "national consensus" that would justify a judicially-imposed ban on LWOP sentences for teenage murderers. Accordingly, the Court should exercise restraint until the public debate and democratic process have had an opportunity to take their course.

ARGUMENT

I. The Court should not lightly disturb the sovereign authority that states exercise over their discrete criminal-justice systems.

This Court frequently has recognized that "administration of a discrete criminal justice system is among the basic sovereign prerogatives States retain." *Oregon* v. *Ice*, 555 U.S. 160, 168 (2009) (citing *Patterson* v. *New York*, 432 U.S. 197, 201 (1977)). As a result, "preventing and dealing with crime is much more the business of the States than it is of the Federal Government," and this Court will "not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson*, 432 U.S. at 201 (citing *Irvine* v. *California*, 347 U.S. 128, 134 (1954)).

On its face, this Court's insistence on a "national consensus" as a prerequisite to categorically prohibiting a particular sentencing practice, *Graham*, 130 S. Ct. at 2022, appears to embody the same sort of heightened concern for state sovereignty this Court historically has acknowledged when evaluating the constitutionality of state criminal-justice practices. But the actual *Graham* decision was less so.

The *Graham* opinion began by acknowledging that 37 states and the federal government had laws on their books that allowed LWOP sentences for nonhomicide teenage offenders in at least some circumstances. But the opinion's analysis then rejected the state-sovereign prerogative and judicially repealed those laws, perhaps failing to fully account for state sovereignty.

First, the *Graham* opinion examined actual sentencing practices in the various states and concluded that the relatively sparse use of LWOP sentences for nonhomicide teenage offenders revealed a "consensus" against the practice. 130 S. Ct. at 2026–27. There is another possible conclusion to draw from this fact. The then-existing state practice allowed those individuals closest to the facts of each unique case—prosecutors and judges—to determine the propriety of an LWOP sentence. The fact that a low number of teenage, nonhomicide crimes actually resulted in LWOP sentences did not necessarily demonstrate a disdain for such a practice. More likely, it proved that the system was working: prosecutors sought the highest, non-capital punishment available only in the most severe cases, when the sentence was justified. Proper deference to state sovereignty includes honoring this state and prosecutorial restraint.

Second, the *Graham* opinion recognized that choosing among the different goals of criminal punishment "is within a legislature's discretion." 130 S. Ct. at 2028 (citing *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991)). That recognition has both separation-of-powers and federalism components. At the time *Graham* was decided, 37 states had determined that LWOP sentences for nonhomicide teenage offenders satisfied the penal goals of retribution, deterrence, incapacitation, and rehabilitation. But the opinion essentially suggests that the legislatures abused their discretion in making that determination. *Id.* at 2028–30. As Respondents explain in their merits briefs, Alabama Br. 48–55, Arkansas Br. 25–36, these penal goals cut much differently in the context of teenage murderers, because there is a bright line "between

homicide and other serious violent offenses against the individual." *Graham*, 130 S. Ct. at 2027. Nonetheless, federalism principles suggest that state legislative judgments be accorded additional respect.

II. The Court should not cut short the democratic process that already is playing out in state capitals regarding the propriety of LWOP sentences for teenager murderers.

Wholly aside from protecting state sovereignty, this Court should be cautious, not precipitous, before recognizing a new constitutional right that wipes away existing state law. In other words, regardless of the Court's view of the propriety of LWOP sentences for teenage murderers, there are societal costs for moving too quickly.

Take the Court's decision in *Roper*. Now that the Court has definitively held that the juvenile death penalty always is unconstitutional, there will be no more public, democratic debate about the propriety of such a sentence. This will be true even if there is a sudden change in crime patterns and citizens believe that the death sentence would be appropriate. Even those who would have supported the death penalty will stop debating the issue in the statehouse and court of public opinion, because the Court has foreclosed any ability to effect change at the legislative level.

Depriving American citizens of the opportunity to have a public debate comes at a high cost. For example, if this Court holds that LWOP sentences for teenage murderers is unconstitutional, society will not have the opportunity to reach this Court's understanding of "justice" through public exchanges of information and

discussion. And short-circuiting the state legislative process before society has reached a true "consensus" is damaging, both to our democratic form of government and to this Court's institutional credibility.

It is possible to see that debate happening right now. States continue to reevaluate their sentencing schemes for teenage murderers, sometimes reducing punishment, but more often maintaining or enhancing sentence length. If societal views coalesce eventually around one side or the other of this issue, the democratic process—not the courts—can and will respond to that popular sentiment. Particularly when interpreting a constitutional amendment that is "consensus" based, it is appropriate to allow public debate and the marketplace of ideas to play their course.[2] A premature decision ossifies the debate, leaving those who hold the "disfavored" views on the matter frozen in place and effectively silenced.

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[2] This public discourse is certainly present in Michigan. Long ago, Michigan was the first English-speaking government in the world to abolish totally the death penalty. But Michigan's citizens, ravaged by juvenile violent crime, enhanced the sentence length for teenage murderers. An overly aggressive Eighth Amendment jurisprudence inhibits Michigan's ability to innovate and adjust to the changing needs of its citizens.

III. The Court should be cautious before using international law to shed light on "national" consensus.

Exactly 200 years ago, Chief Justice John Marshall observed that "All exceptions . . . to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 136 (1812). Yet *Roper* and *Graham* both looked to the legal systems of other nations as evidence of what should be considered "cruel and unusual punishment." Regardless of the validity of using international law to understand other provisions of the U.S. Constitution, its use should be most circumscribed when discerning a "*national* consensus" as to the cruelness or unusualness of a state's sovereign sentencing practice. Indeed, this Court has never held that international law has that role. It has only said that international practice can confirm the Court's independent judgment about the cruel-and-unusual nature of a practice.[3]

The divergence between U.S. law and that of the rest of the world reaches far beyond the punishment of teenagers. As but one of many examples, a German

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[3] Petitioners are wrong to assert that the United States is in "potential violation" of its obligations under international treaties. (Jackson Br. 51 n.66.) See Stimson & Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* 46–54 (Aug. 2009) (explaining that the United States is not a party to the Convention on the Rights of the Child, and that the International Covenant on Civil and Political Rights and the Convention Against Torture do not prohibit juvenile LWOP in the United States).

trial court recently convicted one of the 9/11 co-conspirators on over 3000 counts of accessory to murder. His sentence was 15 years, the maximum allowed under German law, which was reduced to only 7 years after an appeal and retrial.[4] Such a result for one of the most notorious acts of murder in the history of the United States would have sparked outrage here. There is no question that such a crime would have resulted in the death penalty in our nation. The result represents a fundamental disparity in notions of appropriate punishment.

A. Considering foreign policies distracts from the relevant Eighth Amendment considerations

The definition of "cruel and unusual punishment" is understood to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958). The Court has therefore developed a two-prong test that considers both an objective evaluation of the national consensus and a subjective judicial consideration of whether the punishment is in accord with "the dignity of man." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976).

In this second prong, the Court is left to its own devices in deciding whether a punishment is excessive as the "maturing society" understands it. *Trop*, 356 U.S. at 101. The Court undoubtedly has broad latitude in coming to a conclusion on this subjective element.

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[4] Craig Whitlock, Friend of 9/11 Hijackers Convicted in Germany, Wash. Post, Aug. 20, 2005, at A12.

But foreign sources tell the Court little about whether a punishment exceeds what is acceptable for the United States penal system. Among other things, other nations, with different legal and moral traditions, may have chosen different penal goals.

Determining whether a teenage murderer is deserving of a particular term-of-years punishment is a highly context-specific process that does not necessarily span across legal systems. Younghjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. Pa. L. Rev. 63, 81 (Nov. 2007). There are multiple reasons why a punishment might be deemed "deserved" in one country but not in another. For instance, using the retributive theory of punishment, a certain crime may be considered a more serious violation in one country than another, requiring a greater payment to society. *Id.* at 80.

On the other hand, using the deterrence theory of punishment, the punishments might look different because one country has an inflated scale of imprisonment compared to another, requiring a comparatively greater punishment to effectively deter. *Ibid.* Since statistics alone cannot explain the penal theory behind a punishment or its harshness relative to other penalties, comparing American punishments to generalized statistics of foreign punishments does nothing to demonstrate whether or not a certain punishment is excessive. After all, this analysis asks whether separating teenage murderers from society permanently is justified to protect the community or vindicate justice based on the gravity of murder, the most serious offense under law.

Examining foreign judgments also runs the risk of supplanting the actually relevant data gathered in the national consensus analysis. It was for this reason that Chief Justice Rehnquist rejected the recourse to foreign sovereigns entirely: "if it is evidence of a *national* consensus for which we are looking, then the viewpoints of other countries simply are not relevant." *Atkins* v. *Virginia*, 536 U.S. 304, 325 (2002) (Rehnquist, C.J., dissenting) (emphasis added).

B. Foreign governments have different policies and agendas that cannot be captured in sentencing data.

Academic articles often imply that foreign law is a unified whole that can be used to interpret the morality of United States sentencing practices. But by the very nature of their history and cultures, other nations have laws that reflect different understandings of justice, even on continents considered most similar to our own in morals and culture.

For instance, American law's view of individual rights is grounded in popular democracy, sovereignty, and written constitutions. In stark contrast, European constitutionalism and the international notion of human rights are based on "principles that derive their authority from sources outside of or prior to national democratic processes." Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971, 1999 (2004). Since foreign governments are not guaranteed to value the same rights and privileges as the United States, they cannot be counted on as providing examples of the "evolving standards of decency"

necessary for Eighth Amendment analysis. *Trop*, 356 U.S. at 101.

If we do choose to look to foreign nations as examples for our system of punishment, there is the further problem of which nations to choose. But when we stratify foreign countries by maximum allowable juvenile sentence, it is clear that there is very little international consensus on how much punishment is too much. Dirk Van Zyl Smit, *Outlawing Irreducible Life Sentences: Europe on the Brink?*, 23 Fed. Sentencing Rptr., No. 1 at 39–48 (Oct. 2010) (citing Frieder Dünkel & Barbara Stańdo-Kawecka, *Juvenile Imprisonment and Placement in Institutions for Deprivation of Liberty – Comparative Aspects, Juvenile Justice Systems in Europe – Current Situation and Reform Developments* 1772 (2010)). In 2010, maximum youth sentences in Europe ranged from life imprisonment with the possibility of parole in the Netherlands, Scotland, and England to 20 years imprisonment in Greece and Romania, to just three years imprisonment in Portugal. *Id.* When the European community differs so greatly in its concept of what length of sentence is excessive, American courts are forced to cherry-pick which nations most represent American values and answer the subjective question of whether the United States is more like the Netherlands or more like Portugal.

The international test is even more problematic because American ideals on punishment sometimes evolve in the opposite direction of those in foreign nations. In recent years, several nations that once allowed LWOP sentences have outlawed them. Connie De La Vega & Michelle Leighton, *Sentencing our*

Children to Die in Prison: Global Law and Practice, 42 U.S.F. L. Rev. 983, 996–1004 (2008). Meanwhile, in the United States, state legislatures consistently *increased* the severity of punishments for teenage offenders over the past 20 years. *Graham*, 130 S. Ct. at 2050 (Thomas, J. dissenting). During that time period, "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems *more* punitive." *Id.*, quoting 1999 DOJ National Report 89 (emphasis added). If state legislatures have unequivocally expressed their preference for a more punitive sentencing scheme for teenage offenders, it makes little sense to seek guidance from foreign legal systems that not do not share our history or institutions and consistently have moved in the opposite direction on this issue.

IV. The Court should decline to use a categorical ban on a term-of-years sentence involving the crime of murder.

Graham represented the first decision in the Court's history to declare "an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone." *Graham*, 130 S. Ct. at 1046 (Thomas, J. dissenting). Even in the context of nonhomicide teenage offenders, such an approach did not allow for states to conclude that the most reprehensible teenage offenders might warrant an LWOP sentence. See *id.* at 2041 (Roberts, C.J., concurring in the result) ("[W]hat about Milagro Cunningham, a 17-year-old who beat and raped an 8-year-old girl before leaving her to die under 197 pounds of rock in a recycling bin in a remote landfill? Or

Nathan Walker and Jakaris Taylor, the Florida juveniles who together with their friends gang-raped a woman and forced her to perform oral sex on her 12-year-old son?"). Categorical sentencing bans eliminate the possibility that a particular sentence, such as LWOP, *ever* will be appropriate. Such a rule "is as unnecessary as it is unwise." *Id.*

The facts of countless teenage murderers demonstrate, in graphic fashion, why this Court should eschew the categorical approach in favor of a more nuanced, case-by-case determination. Despite the sociological evidence that teenagers, as a whole, can be impetuous and subject to peer pressure, it cannot be disputed that individual cases show a perversity of will, a moral culpability, and a propensity for recidivism that a categorical rule will never take into account. "Those under 18 years old may as a general matter have 'diminished' culpability relative to adults who commit the same crimes, but that does not mean that their culpability is always insufficient to justify a life sentence." *Graham*, 130 S. Ct. at 2041–42 (Roberts, C.J., concurring in part). Given that "specific cases are illustrative," *Graham*, 130 S. Ct. at 2031, consider the following examples, just from a single Michigan county:

- 14-year-old Calvin Hirsch and 15-year-old Donyelle Black pulled Wanda Sutherland, 39, from her car at gunpoint. They raped, robbed, and beat her, then shot her in the head and killed her, ignoring her many pleas for mercy. Black received a sentence of LWOP, but Hirsch pleaded guilty and was sentenced as a juvenile, serving only 5 years and released at 19. At age 23, he shot and killed Dora Lisa Shaw over a

$13 drug debt. This murder would have been averted had the LWOP sentence Hirsch received at 23 been imposed at age 14.[5]

- Barbara Hernandez, then 16, watched as her 20-year-old boyfriend slit a man's throat, then stabbed him 25 times so the couple could steal his car.[6]

- John Polick, 16-years-old, shined the flashlight on a 67-year-old woman while his older brother brutally beat her to death so the brothers could steal a television.[7]

- 15-year-old Christopher Dankovich stabbed his mother 111 times in their Rochester Hills home.[8]

- 17-year-old Michael Kvam raped and killed a woman, a teenager, and a little girl in Rochester Hills. The brutality of the crimes shook a local judge enough to change his stance on the death penalty.[9]

Finally, consider the case of Maurice Clemmons, a *former* teenage lifer in Arkansas. Clemmons was sentenced to 95 years without parole as a 17-year-old

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[5] Stephen Frye, *Human Rights: Children facing life*, Oakland Press (Nov. 13, 2005), available at http:www.axisoflogic.com /artman/publish/Article_19945.shtml.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

for robbery, burglary, theft, and bringing a gun to school. His sentence was commuted by the then-Arkansas Governor, "because of his age." At 2:45 a.m., four police officers were shot and killed in cold blood in a Seattle coffee shop.[10] These four officers would have been saved if the Arkansas Governor had preserved the LWOP sentence Clemmons received.

These are crimes committed by coldhearted murderers, not "children." To say that these brutal offenders are not culpable or not capable of recidivism is to ignore reality. See Lerner, Craig S., *Juvenile Criminal Responsibility: Can Malic Supply the Want of Years?*, 86 TULANE L. REV. 309 (2011). And downplaying teenage murder also ignores the plight of victims and their heartbroken families.

In sum, murder is different, as this Court tacitly acknowledged in upholding an LWOP sentence for a teenage murderer in *Roper*. Accordingly, the Court should limit *Graham*'s application to non-murder cases and otherwise restore harmony with the Court's pre-*Graham* appreciation of the special place of the death penalty in its Eighth Amendment jurisprudence. Such an approach also would align this Court's Eighth Amendment precedent with its recent cases in other juvenile-justice areas that reject categorical rules in favor of balancing tests that take many factors—including the defendant's age—under consideration. E.g., *J.D.B.* v. *North Carolina*, 131 S. Ct. 2394, 2408 (2011) (requiring a case-by-case analysis taking the

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[10] CNN, *Police, Suspect dead, had slain cop's gun* (Dec. 1, 2009), available at http://www.cnn.com/2009/CRIME/12/01/Washington.suspect.shot/; Nat'l Organization of Victims of Juvenile Lifers, *Dangerous Early Release*, available at http://www.teenkillers.org.

defendant's age into account in the *Miranda* custody analysis, rather than a "more easily administered" bright-line rule).

There is no reason to impose a categorical ban and overturn 38 state sentencing laws simply because it is a teenager, rather than an adult, who has committed the most heinous of crimes: the taking of a human life.

V. The Court should not categorically prohibit LWOP sentences for teenage murderers.

A. There is no "national consensus" regarding sentencing for teenage murderers.

Arkansas and Alabama correctly argue that there is no "national consensus" in favor of abolishing LWOP sentences for teenage murderers. The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Atkins*, 536 U.S. at 312 (quoting *Penry* v. *Lynaugh*, 492 U.S. 302, 331 (1989)). And current state legislation (and its recent history) do not justify a categorical ban.

The notion of trying juveniles in adult court was rare until a steep rise in violent youth crime in the mid-1980s triggered a move toward harsher penalties and made adult sentences available to juveniles who commit the same crimes. Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States*, 14 (2005), http://www.hrw.org/en/node/11578/section/4 (last visited February 5, 2012). "By 1997, all states but three (Nebraska, New York, and Vermont) had

changed their laws to make it easier and more likely that child offenders would stand trial and be sentenced in adult criminal courts." *Id.*

Of the 44 states that now allow LWOP for homicides, 36 do so for offenders who commit their crimes before the age of 15. *Id.* Petitioners note that there are approximately 79 offenders serving LWOP in the United States for offenses committed at the age of 13 or 14. (Jackson Pet'r Br. at 47–48.) That number is almost certainly understated.[11]

Moreover, the number of under-15 teenage murderers serving LWOP sentences cannot logically be attributed to a consensus against such sentences, as Petitioners argue. Rather, the numbers reflect how few 13- and 14-year-olds commit the types of barbaric murder for which the states (and their prosecutors) have reserved the second-most-severe criminal punishment. States that allow but do not impose LWOP for teenage murderers—or only do so selectively in the most egregious cases—should not be treated as if they have expressed the view that the sentence is inappropriate.

In determining whether a particular sentencing practice is categorically "cruel and unusual" under the Eighth Amendment, the Court also considers "the

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[11] For example, Michigan understands that Miller's counsel has informed Alabama that its current estimate includes five such offenders in Michigan. But the Michigan Department of Corrections has informed the Attorney General's office that the correct number is actually seven. There is thus quite possibly substantial imprecision in the numbers Miller has offered to the Court.

culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question" and "whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 130 S. Ct at 2026 (internal citations omitted).

Petitioners argue that "every factor which the Court considered crucial for the results in *Roper* and *Graham* equally or more strongly compels the invalidation" of LWOP sentences for young teens who commit murder. Jackson Br. 8. Not so. Generalizations about teenagers are always dangerous. To suggest that there is not a single teenage murderer whose culpability, depravity of will, and risk of recidivism justifies an LWOP sentence defies credibility. As described above, there are certain teenage offenders whose horrific crimes warrant an LWOP sentence.

Finally, LWOP sentences for 14-year-old murderers do serve legitimate penological goals. An LWOP sentence is appropriate retribution for one who takes a human life, often in the most vicious, brutal, and inhumane ways possible, as the examples above demonstrate. "Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim," such a sentence clearly is not disproportionate to a crime that causes such severe, irreparable harm to the victim, his or her family, and society. *Roper*, 543 U.S. at 571.

An LWOP sentence is also appropriate for deterrence. Even if such a sentence deters teenage murders "in a few cases," *Graham*, 130 S. Ct. at 2029, that means lives saved.

As for incapacitation, the *Graham* Court expressly recognized that, while it "may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide." *Graham*, 130 S. Ct. at 2029. The Court continued by recognizing the potential for a "rare juvenile offender whose crime reflects irreparable corruption." *Id.* (quoting *Roper*, 543 U.S. at 572). Teenage murders provide precisely the context that is justified by the legitimate penological goal of incapacitation. The Court should not foreclose courts from imposing LWOP sentences for those rare offenders whose crimes do reflect "irreparable corruption."

In sum, LWOP sentences for juvenile homicide offenders are justified by at least three legitimate penological goals—retribution, deterrence, and incapacitation. As the Court reiterated in 2010, "Choosing among them is within a legislature's discretion." *Graham*, 130 S. Ct. at 2028 (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 999 (1991)). There is no basis to disturb the people's wisdom in exercising that discretion in 38 states and at the national level.

B. Petitioners' sentences are not grossly disproportionate to their offenses.

With the singular exception of *Graham*, the Court has used a case-by-case balancing test to analyze non-capital cases in evaluating Eighth Amendment challenges. The Court begins with a threshold inquiry "comparing the gravity of the offense and the severity of the sentence" to determine whether the punishment

is "grossly disproportionate for a particular defendant's crime." *Graham*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005) (opinion of Kennedy, J.)). In the "rare case" in which this threshold inquiry indicates "gross disproportionality," the court next "compare[s] the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions." *Id.*

An LWOP sentence is undeniably a severe punishment to impose on any defendant, let alone a 14-year-old. But it is not disproportionately so with regard to Petitioners' offenses.

Petitioner Evan Miller and his 16-year-old co-defendant went to Miller's 52-year-old neighbor Cole Cannon's trailer with a plan to steal money from him. When an altercation ensued, Miller "climbed onto Cannon and began hitting him in the face with his fists," "picked up [a baseball] bat . . . and continued to attack Cannon by striking him with it repeatedly." Miller J.A. 133. He then told him, "I am God, I've come to take your life." After leaving briefly, the two returned to the trailer of their incapacitated victim and set several fires "to cover up the evidence." *Id.* Firefighters discovered Cannon's body in the burning trailer. Miller J.A. 134.

As the Wisconsin Supreme Court recognized in the post-*Graham* case of *State* v. *Ninham*, 797 N.W.2d 451, 475 (Wis. 2011), "[that the defendant] was just 14 years old at the time of the offense and suffered an indisputably difficult childhood does not . . . automatically remove his [LWOP] punishment out of the realm of the proportionate."

The case of Kuntrell Jackson presents a different situation, though one that remains similarly within the "realm of the proportionate." *Ninham*, 797 N.W.2d at 475. Jackson, aware that one of his two accomplices, Derrick Shields, "was carrying a sawed-off .410 gauge shotgun in his coat sleeve," proceeded with a plan to rob a neighborhood video store. When store clerk Laurie Troup repeatedly insisted she did not have any money and "mentioned something about calling the police. Shields shot her in the face," killing her. Jackson J.A. 84–85.

Jackson was convicted of capital murder and sentenced to LWOP after the trial court found that Troup's death occurred "under circumstances manifesting an extreme indifference to the value of human life" in the course of the aggravated robbery in which Jackson was involved. Jackson J.A. 85. While felony murder may present somewhat less dramatic scenarios than those in which the defendant is the "triggerman," an overwhelming majority of 46 states hold all co-conspirators liable for murder if a death results during the commission or attempted commission of a felony. *See* John Gramlich, *Should murder accomplices face execution?* (2008), http://www.stateline.org/live/details/story?contentId=333117.

It is not unreasonable to conclude that a person like Evan Miller, who can tell his victim—against whom he has no vendetta—that "I am God and I have come to take your life" while beating him with a baseball bat, poses the kind of risk that will never lessen with time. He is uniquely dangerous. And his crime is one that cries out for justice. The conclusion

that he has to forfeit his right to live in the community for the rest of his life is neither cruel nor unusual.

The same is true for Kuntrell Jackson. He assisted Derrick Shields in a robbery during which Shields coldly executed the store clerk, shooting her in the face with a shotgun, while she pleaded that she had no money. These are the gravest offenses against justice, reflecting an incorrigible indifference to human life. The State of Arkansas acts within its right by requiring that the perpetrators lose their right to live in society. Again, this is neither cruel nor unusual.

Miller and Jackson's crimes were pre-planned, brutal, and senseless. Their victims lost their lives, and the victims' families are forever changed. Miller and Jackson continue their lives in prison. The punishment of permanently removing them from society is not "grossly disproportionate," despite any lessened culpability the Court may attribute to them due to their age. Not being such "rare case[s]" in which this threshold inquiry indicates "gross disproportionality," the court need not proceed to the second step of the balancing analysis. *Graham*, 130 S. Ct. at 2022 (quoting *Harmelin*, 501 U.S. at 1005 (opinion of Kennedy, J.)).

CONCLUSION

The judgments of the courts of appeal should be affirmed.

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Dated: FEBRUARY 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 17 2012
OFFICE OF THE CLERK

Nos. 10-9646 & 10-9647

IN THE
Supreme Court of the United States

EVAN MILLER, *Petitioner*,
v.
ALABAMA, *Respondent*.

KUNTRELL JACKSON, *Petitioner*,
v.
RAY HOBBS, Director,
Arkansas Department of Correction, *Respondent*.

On Writ of Certiorari to the
Alabama Court of Criminal Appeals
and the Supreme Court of Arkansas

BRIEF OF AMICI CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, LATINOJUSTICE PRLDEF, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. The Eighth Amendment Demands Fair Evaluation of Culpability. 2

II. Race Undermines the Evaluation of Culpability in the Sentencing of Children to Life Without Parole. 4

A. Race Influenced the Implementation of Laws Allowing Children to be Sentenced to Life Without Parole. 5

1. The Media. 10

2. The Academics. 14

3. The Legislators. 21

III. Consistent with Their History, Juvenile Life Without Parole Laws Are Overwhelmingly Imposed Upon Children of Color 26

IV. Proper Evaluation of Culpability Has Been Undermined by the Racially Charged Criminalization of Youth of Color 30

CONCLUSION 35

ADDENDUM 1a

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 3

Batson v. Kentucky, 476 U.S. 79 (1986) 4

City of Memphis v. Greene, 451 U.S. 100 (1981).....9

Coker v. Georgia, 433 U.S. 584 (1977).....3

Eddings v. Oklahoma, 455 U.S. 104 (1982).....31

Enmund v. Florida, 458 U.S. 782 (1982) 2

Graham v. Florida, 130 S. Ct. 2011 (2010) 2, 31, 33

Hernandez v. Texas, 347 U.S. 475 (1954).....4

Hill v. Texas, 316 U.S. 400 (1942) 4

In re Gault, 387 U.S. 1 (1967).....6, 7

J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394 (2011).....3, 31

Kennedy v. Louisiana, 554 U.S. 407 (2008) 2

Kent v. United States, 383 U.S. 541 (1966).....6, 7

McKiever v. Pennslyvania, 403 U.S. 528 (1971).....6, 7

Roper v. Simmons, 543 U.S. 551 (2005).....3, 31

Rose v. Mitchell, 443 U.S. 545 (1979).....4

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STATEMENT OF INTEREST[1]

Amici curiae NAACP Legal Defense and Educational Fund, Inc., Charles Hamilton Houston Institute for Race and Justice, LatinoJustice PRLDEF, Asian American Legal Defense and Education Fund, and Leadership Conference on Civil and Human Rights are non-profit organizations dedicated to, among other goals, eradicating the impact of race in the administration of justice. More details about individual amici are included in the Addendum.

SUMMARY OF ARGUMENT

The question presented by these cases is whether the imposition of a life without parole sentence on a fourteen-year-old child convicted of a homicide offense violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments. As detailed by the submissions of the Petitioners and their amici curiae, the answer is "yes." As this amicus brief explains, the improper influence of race impairs the culpability analyses of children subject to life without parole sentences, which is further evidence of the unconstitutionality of this sentencing practice. Although a proper evaluation of culpability is fundamental under the Eighth and Fourteenth Amendments, history shows

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[1] Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. Pursuant to S. Ct. Rule 37.6, counsel for the amici curiae states that no counsel for a party authored this brief in whole or in part, and that no person other than the amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that racial stereotypes propelled the implementation of the laws that led to juvenile life without parole sentences, and research establishes that children of color are sentenced to life without parole at markedly disproportionate rates. This Court declared, in *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011 (2010), that youth are less culpable than adults and, therefore, less deserving of life without parole sentences. Yet, it is clear that race critically and inappropriately influences the assessment of blameworthiness in the context of juvenile life without parole sentencing. Given this constitutional infirmity, as well as the severity and finality of a death-in-prison sentence, this Court should categorically exempt youth from life without parole sentences.

ARGUMENT

I. The Eighth Amendment Demands Fair Evaluation of Culpability.

In *Graham*, this Court held that children convicted of nonhomicide offenses were categorically barred from receiving life without parole sentences because, "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." 130 S. Ct. at 2027. Relying on a long line of death penalty precedents, *Graham*, for the first time, recognized that a non-death sentence was unconstitutional under the Eighth Amendment because a category of individuals – in that case, children who did not commit murder – were not sufficiently culpable for a life without parole sentence. *See id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Enmund v.*

Florida, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Coker v. Georgia*, 433 U.S. 584 (1977)); *see also Roper v. Simmons*, 543 U.S. 551 (2005) (excluding children from death penalty because less culpable than adults); *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (barring people with mental retardation from receiving death penalty because "the severity of the appropriate punishment necessarily depends on the culpability of the offender," and mental retardation rendered offender less culpable).

That children are less culpable than adults, regardless of their offense, has been firmly established by this Court's holdings in *Graham* and *Roper*.[2] Notwithstanding the seriousness of the crimes at issue, youth homicide offenders have diminished culpability when compared to adult homicide offenders. Moreover, racial overtones and stereotyping tainted the widespread enactment of laws that exposed youth to life without parole, thus contributing significantly to the substantially disproportionate number of minority youth sentenced to juvenile life without parole. This improper influence of race in the sentencing of children to life without parole, therefore, raises serious concerns about whether such extreme sentences are imposed after a constitutionally defensible finding of the requisite level of culpability.

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[2] Indeed, this Court again recently recounted the stark range of differences between children and adults reflected in the lesser culpability of youth. *See J.D.B. v. North Carolina*, 564 U.S. ___, 131 S. Ct. 2394, 2403-05 (2011) (discussing well-established deficiencies of youth).

Race, of course, cannot – and should not – play any role in the imposition of criminal sanctions. Indeed, "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Thus, this Court has consistently condemned the influence of race at all levels of the criminal justice system. *See Batson v. Kentucky*, 476 U.S. 79 (1986) (race discrimination in use of peremptory strikes); *Turner v. Murray*, 476 U.S. 28 (1986) (juror's racial bias); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (race discrimination in grand jury selection); *Whitus v. Georgia*, 385 U.S. 545 (1967) (race discrimination in grand and petit jury selection); *Hernandez v. Texas*, 347 U.S. 475 (1954) (race discrimination against Mexican-Americans in petit jury selection); *Hill v. Texas*, 316 U.S. 400, 406 (1942) (race discrimination in grand jury selection). Yet, given the racial taint on juvenile life without parole sentencing, there can be no guarantee that children will receive a fair and proper consideration of their culpability. Race inhibits the mitigating value of youth, thereby impairing the evaluation of culpability that is necessary for a juvenile life without parole sentencing scheme to fall within constitutional bounds. Accordingly, life without parole sentencing for any criminal offense cannot safely be imposed on youth offenders without violating the Eighth Amendment.

II. Race Undermines the Evaluation of Culpability in the Sentencing of Children to Life Without Parole.

Over two decades ago, the pernicious influence of race helped to shape the public, political and legal

discourse on juvenile violent crime in the United States. The media, academics and legislators portrayed youth, and in particular youth of color, as exceedingly dangerous, violent and blameworthy.[3] The consistent connection between race, youth and criminal behavior undermined the widely accepted view, expressly affirmed in *Graham*, that youth are less culpable for their crimes than adults. *Graham*, 130 S. Ct. at 2026. In turn, these stereotypes were employed to justify the use of harsh punitive measures on criminally involved youth that had previously been limited to adult offenders.

A. Race Influenced the Implementation of Laws Allowing Children to be Sentenced to Life Without Parole.

For much of the 20th century, youthful offenders were subject to the jurisdiction of the juvenile court, a court that recognized that fundamental differences between children and adults warranted lesser punishments.

> The early reformers were appalled . . . by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child – essentially good, as they saw it – was to be made 'to feel that he is the object of [the state's] care and solicitude,' not that he was under arrest or on trial. . . .

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[3] This Court has recognized the role that false stereotypes about people of color can play in sentencing determinations in capital cases. *See Turner*, 476 U.S. at 35 (noting that "[m]ore subtle, less consciously held racial attitudes" such as fear of a particular racial group "could also influence" sentencing decisions).

> The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive.

In re Gault, 387 U.S. 1, 15-16 (1967) (alteration in original) (citations omitted).[4] Thus, "[t]he juvenile court combined the . . . conception of childhood with the . . . strategies of positive criminology to create a judicial-welfare alternative to the adult criminal process for juveniles." Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash,"* 87 Minn. L. Rev. 1447, 1458 (2003) [hereinafter Feld, *Race, Politics, and Juvenile Justice*]. Recognized as lacking maturity and fully formed personalities, children were removed from the adult process and subjected to intervention strategies to serve their best interests and prevent further criminal involvement. Barry C. Feld, *The Honest Politician's Guide to Juvenile Justice in the Twenty-First Century*, 564 Annals Am. Acad. Pol. & Soc. Sci. 10, 12 (1999). The state acted as *parens patriae* to ensure a youth's well-being. Distinctive terminology was employed in an "attempt to reduce the stigma attached to juvenile

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[4] *See also Kent v. United States*, 383 U.S. 541, 554-55 (1966) (describing juvenile court as "engaged in determining the needs of the child and of society rather than adjudicating criminal conduct"); *McKiever v. Pennsylvania*, 403 U.S. 528, 551-52 (1971) (White, J., concurring) (highlighting the difference between the adult criminal system that accounts for adult culpability and punishes them accordingly, and the juvenile system that recognizes the lesser culpability of youth and works to rehabilitate young offenders).

court adjudications." Michele Benedetto Neitz, *A Unique Bench, a Common Code: Evaluating Judicial Ethics in Juvenile Court*, 24 Geo. J. Legal Ethics 97, 110 (2011).[5] This Court secured children's constitutional protections in the juvenile court.[6]

The nature of the juvenile justice system changed significantly in the late 1980s and early to mid-1990s when our public discourse became "consumed by [a] looming threat posed by America's youth" and a predicted increase in violent juvenile crime. Perry L. Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 Md. L. Rev. 849, 850-51 (2011). The rehabilitative norms that had characterized the juvenile justice system since its inception were dismantled through "the broadest and most sustained legislative crackdown ever on serious offenses committed by youth within the jurisdictional ages of American Juvenile Courts." Franklin E. Zimring, *The 1990s Assault on Juvenile Justice: Notes from and Ideological Battleground*, 11 Fed. Sent'g Rep. 260 (1999). "Inherent in many of the changes [was] the belief that serious and violent juvenile offenders must be held more accountable for their actions. Accountability [was] . . . defined as

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[5] Specifically, "[c]harges are brought as 'petitions' instead of 'complaints' or 'indictments,' and 'trials' are called 'jurisdictional hearings.' Young offenders are referred to as 'minors' or 'delinquents,' not 'defendants' or 'criminals,' and convicted juvenile offenders receive 'dispositions,' rather than 'sentences.'" *Id.* (citations omitted).

[6] *See, e.g.*, *McKiever*, 403 U.S. 528; *In re Gault*, 387 U.S. 1; *Kent*, 383 U.S. 541.

punishment or a period of incarceration . . . ."[7] Rather than dispositions based on the needs of a juvenile and rehabilitation, states focused on punitive sanctions for particular offenses.[8] "[P]unitive segregation – strategies to incapacitate and exclude young offenders rather than to change and reintegrate them" – were enacted. Feld, *Race, Politics and Juvenile Justice*, *supra*, at 1559.

This ideological shift was, in part, the product of a widespread legislative response to fluctuating crime rates among youth.[9] Critically, the response

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[7] Patricia Torbet, et al., U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *State Responses to Serious and Violent Juvenile Crime* xi (1996), *available at* http:// www. ncjrs. gov/ pdffiles / statresp.pdf.

[8] Sara Sun Beale, *You've Come a Long Way, Baby: Two Waves of Juvenile Justice Reforms as Seen from Jena, Louisiana*, 44 Harv. C.R.-C.L. L. Rev. 511, 521 (2009) [hereinafter Beale, *Two Waves of Juvenile Justice*]; *see also* Jane Rutherford, *Juvenile Justice Caught Between the Exorcist and a Clockwork Orange*, 51 DePaul L. Rev. 715, 721 (2002).

[9] Juvenile arrests for violence and homicide rose sharply at points between 1986 and 1994. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & Fam. Stud. 11, 29 (2007) [hereinafter Feld, *Unmitigated Punishment*]. However, those rates eventually fell in a consistently downward slope to the present day. *See* Alexia Cooper & Erica L. Smith, U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends in the United States, 1980-2008* 4 (Nov. 2011), *available at* http://bjs.ojp.usdoj.gov/ content/pub/pdf/htus8008.pdf (noting that "[a]fter 1993, the [homicide offending] rate fell so much that by 2000, the offending rate for teens was near its 1985 level"). A close examination of the statistics reveals that "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s." Franklin E. Zimring, *The Youth Violence*

coincided with the deliberate reinforcement of a perceived link between race and teen crime. Throughout the late 1980s and early to mid-1990s, the media, academics and politicians consistently characterized teen crime in racially coded terms.[10] Efforts to explain teen crime conflated race, youth and criminal behavior. Youthful offenders, and in particular youth of color, were thought to pose a higher threat of violent criminal activity because of

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Epidemic: Myth or Reality, 33 Wake Forest L. Rev. 727, 728 (1998) [hereinafter Zimring, *Youth Violence Epidemic*]. Instead, the variations in the juvenile crime rates which occurred over short periods of time are explained by "narrower bands of behavior," specifically "a thin band of highly lethal gun attacks . . . and garden variety assaults. . . ." *Id.*

[10] Coded language consists of "symbols or phrases that indirectly implicate racial themes" without directly speaking to race. Feld, *Race, Politics, and Juvenile Justice*, *supra*, at 1553-55. It is used to "evoke modern racist sentiments without seeming racist or discriminatory [and] allows politicians to appeal to cultural archetypes in the collective unconscious about the 'alien other' who poses a fearful and menacing threat to society." *Id.* at 1553-54. As overt racism has become unacceptable, terms and phrases like tough on crime, urban, inner-city, gangs "and welfare now widely serve as 'coded' [words] that enable politicians to exploit" racial sensitivities "without explicitly playing the 'race card.'" *Id.* at 1554-55. For example, appeals to law and order, "first mobilized in the late 1950s," were used by "Southern governors and law enforcement officials to generate and mobilize . . . opposition to the Civil Rights Movement." Michele Alexander, *The New Jim Crow: Mass Incarceration In the Age of Colorblindness* 40 (2010). Such rhetoric, while appearing facially neutral, carries an implicit racial meaning, given its context and connection to race. *See also City of Memphis v. Greene*, 451 U.S. 100, 135-36 (1981) (Marshall, J., dissenting) (examining historical context and connection between language and race to interpret "code phrases for racial discrimination").

deficient personal traits – immorality, inherent proclivity for violence and remorselessness – rather than external factors like substance abuse, family dysfunction or criminal associations.[11] The proposed remedy, therefore, was to control and incapacitate youth through harsh punishment.[12] The onset of life without parole sentences for youth is the manifestation of those efforts.

1. The Media.

Both television and print media helped to create and reinforce the mythic connection between youth, race and criminality.[13] As crime rates varied in the

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[11] Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 712 (2002); George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments in Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 Am. Soc. Rev. 554, 556 (1998).

[12] Increased punitive measures have been linked to racial typification, which is "the media's stereotypical portrayal of crime as a minority phenomenon." Sarah Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 Wm. & Mary L. Rev. 397, 458-61 (2006). In fact, "[w]hen minority offenders are stereotyped as particularly predatory or disposed to chronic criminal offending, they 'are seen as more villainous and therefore more deserving of severe penalties.'" Bridges & Steen, *supra*, at 555 (citations omitted).

[13] The news is a powerful influence that shapes public opinion. A 2000 poll found that 81% of people formed their beliefs about crime from the news, while 17% gained their beliefs through personal experience. Ernestine S. Gray, *The Media – Don't Believe the Hype*, 14 Stan. L. & Pol'y Rev. 45, 48 (2003). The news also "activate[s] and strengthen[s] linkages among certain racial categories, violent crime, and the fear and

late 1980s and early 1990s, some media began to cast youthful offenders as exceedingly violent, morally deficient and of color. Moriearty, *supra*, at 865-67. Even in the face of declining violent crime rates among juveniles,[14] media portrayals of children accused of crimes continued to carry "silent, racially charged messages," equating youthful criminal behavior with skin color. Rutherford, *supra*, at 720-21.

Thus, throughout the 1990s, youth of color were "overrepresented as perpetrators and underrepresented as victims in media crime stories." Moriearty, *supra*, at 870. The media described child offenders of that era as "'super predators,' 'youthful predators,' 'teen killers,' [and] 'young thugs,'" focusing almost exclusively on children of color. Robert E. Shepard, *How the Media Misrepresents Juvenile Policies*, 12 Crim. Just. 37, 38 (1998). In California, for example, "local news reports . . . feature[d] people of color as gang members or juvenile offenders." Beth Caldwell & Ellen C. Caldwell, *"Superpredators" and "Animals" – Images and California's "Get Tough on Crime" Initiatives*, 2011 J. Inst. Just. Int'l Stud. 61, 67 (2011). And "[a] survey of local television news in Los Angeles revealed that where the race of crime perpetrators was identifiable, nearly 70 percent were nonwhite males." Shepard, *supra*, at 38.

Across the country, portrayals of youth violence in visual and print media were "dominated by

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loathing such crime invokes." Jerry Kang, *Trojan Horses of Race*, 118 Harv. L. Rev. 1489, 1563 (2005).

[14] *See supra* note 9.

pictures of African-American or Latino youngsters." *Id.* By 2000, a study of news broadcasts in six major U.S. cities found that "sixty-two percent of the stories involving Latino youth were about murder or attempted murder [although] . . . in 1998, minority youth accounted for only one quarter of all juvenile crime arrests and less than half of all violent juvenile crime arrests." Moriearty, *supra*, at 871. A 2001 survey revealed that in the preceding decade, the media "misrepresent[ed] crime, who suffer[ed] from crime, and the real level of involvement of young people in crime," such that whites were underrepresented and African-Americans and Latinos were overrepresented in depictions of perpetrators of violent crime. Lori Dorfman & Vincent Schiraldi, Building Blocks for Youth, *Off Balance: Youth Race & Crime in the News* 26 (2001), *available at* http://www.cclp.org/documents/BBY/offbalance.pdf. These faulty portrayals "reinforce[d] the erroneous notion that crime is rising, that it is primarily violent, that most criminals are nonwhite, and that most victims are White." *Id.*

The "Central Park Jogger" case – where five New York City teenagers were convicted of a crime they did not commit – is perhaps the most infamous example of the racialization of teen crime and its dangerous real-life consequences. In 1989, a young, white, female jogger was beaten, raped and left unconscious in Manhattan's Central Park by what police thought were as many as 12 youths. Craig Wolf, *Youths Rape and Beat Central Park Jogger*, N.Y. Times, Apr. 21, 1989, at B1. Five children, aged 14 to 16, were arrested and charged with rape, assault and attempted murder in connection with

the attack. David E. Pitt, *Jogger's Attackers Terrorized at Least 9 in 2 Hours*, N.Y. Times, Apr. 22, 1989, at 11. "All of the suspects were African-American or Latino." Moriearty, *supra*, at 862. The police attributed the attacks to "wilding," a term used by some of the young people brought in for questioning about the incident. *Id.* at 862-63; Pitt, *supra*, at 11. Although those arrested, tried and convicted for the attack were ultimately exonerated,[15] the term "wilding" captured the attention of the public and cemented the perceived link between race and teenage crime.[16]

> In New York City newspapers alone, the term "wilding" would appear 156 times in articles over the next eight years. . . . [I]ts racial connotations were unmistakable. In every one of the 156 New York newspaper articles in which the race of the perpetrator was mentioned in the text, the suspects were identified as either African-American or Latino males; conversely, with the exception

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[15] *See* Susan Saulny, *Convictions and Charges Voided In '89 Central Park Jogger Attack*, N.Y. Times, Dec. 20, 2002, at A1 (describing exoneration).

[16] Indeed, "[f]rom the moment the teenagers . . . were reported to have confessed, the horrific attack was transmogrified in public discourse into an issue of race." N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 Cardozo L. Rev. 1315, 1348 (2004). The term "wilding" was used to connote a form of animalistic savagery reserved for criminally involved youth of color. *See id.* ("[T]he youths were alternately referred to as 'wolf packs,' 'rat packs,' 'savages,' and 'animals.'").

> of a single incident, each of the victims was described as a white female.

Moriearty, *supra*, at 863 (citations omitted). The intense media attention directed at "wilding" "contributed to a growing consensus that there was a new menace threatening society." Michael Welch et al., *Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media*, 34 Youth & Soc'y 3, 10 (2002). "Wilding" was used exclusively to describe the criminal activity of African-Americans and Latinos, thus driving the connection between the race of the alleged perpetrators and their criminal behavior.

Thus, the media exaggerated representations of youth of color as perpetrators of violent crime. As detailed below, the media's racially-laden narrative about youth crime, further embraced and shaped by many academics and politicians, drove punitive measures to incapacitate youth while discounting their lesser culpability.

2. The Academics.

The media's false connection between race, crime and youth was corroborated and propelled by pseudo-scientific research documenting the impending rise of the so-called juvenile "super-predator." According to sociologists and criminologists at the time, these youth were a growing new breed of hyper-violent, morally-depraved and criminally-involved children who would terrorize society.[17] The super-predator myth,

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[17] *See, e.g.*, Peter Annin, *'Superpredators' Arrive*, Newsweek, Jan. 22, 1996, at 57; David Gergen, Editorial,

like "wilding" and other terms associated with the moral panic[18] over youth violence, relied heavily on "racist imagery and stereotypes" and harkened back to "historic representations of African Americans [and other people of color] as violence-prone, criminal and savage." Nunn, *supra*, at 712; Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 Denv. U. L. Rev. 1081, 1083-84 (2001). Thus, to the extent that the super-predator myth contributed to the trend toward harsher sentences for young people, racial bias and stereotype were critical drivers of that momentum.

The term "super-predator" was first used by then-Princeton University Professor and criminologist John J. DiIulio, Jr. as part of his effort to explain

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Taming Teenage Wolf Packs, U.S. News & World Rep., Mar. 25, 1996, at 68; Richard Zoglin, *Now For the Bad News: A Teenage Time Bomb*, Time, Jan. 15, 1996, at 52; Maggie Gallagher, *Juvenile Crime Wave is Just Beginning*, Long Beach Press-Telegraph, May 20, 1996, at B7.

[18] "[M]oral panic over wilding reinforces racial biases prevalent in criminal stereotypes, particularly the popular perception that young Black (and Latino) males constitute a dangerous class. Compounded by sensationalistic news coverage on wilding, along with carjacking, gang banging and other stylized forms of lawlessness associated with urban teens, minority youths remain a lightning rod for public fear, anger, and anxiety over impending social disorder, all of which contribute to additional law and order campaigns."

Welch, *supra*, at 4.

what he and other academics saw as the cause[19] and effect of variable rates of violent youth crime. DiIulio, *Super-Predators*, *supra*, at 1. As detailed by the Academic Amici, Professor DiIulio forecast an impending rash of youth crime and violence – a "demographic crime bomb." *Id.* He warned:

> On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . . [A]s long as their youthful energies hold out, they will do what comes "naturally": murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.

Id. at 4.

Professor DiIulio's theory was based on predictions about population trends, crime rates and overt racial stereotypes. He cloaked crime data in

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[19] DiIulio explained that crime was rooted in what he identified as moral poverty, defined as the "poverty of being without loving, capable, responsible adult[ ]" role models and "growing up surrounded by deviant, delinquent, and criminal adults in abusive, violence-ridden, fatherless, Godless, and jobless settings." John J. DiIulio, Jr., *The Coming of the Super-Predators*, The Weekly Standard, Nov. 27, 1995, at 3, *available at* http://cooley.libarts.wsu.edu/schwartj/criminology/dilulio.pdf [hereinafter DiIulio, *Super-Predators*]. According to Professor DiIulio and his co-authors, moral poverty creates super-predators, who are more likely to be African-American children and other children of color, who have grown up in what they term "criminogenic communities." *See generally* William Bennett et. al., *Body Count: Moral Poverty . . . And How to Win America's War Against Crime and Drugs* 22, 28 (1996).

racial terms, emphasizing the racial demographics of the predicted wave of juvenile criminals:

> The surge in violent youth crime has been most acute among black inner-city males. . . . Moreover, the violent crimes experienced by young black males tended to be more serious than those experienced by young white males . . . . In Los Angeles, there are now some 400 youth street gangs organized mainly along racial and ethnic lines: 200 Latino, 150 black, the rest white or Asian. In 1994, their known members alone committed 370 murders and over 3,300 felony assaults.

Id. at 2.

Professor DiIulio placed a racialized gloss on population trends to concluding that the mere growth in the population of youth of color would ensure greater numbers of so-called super-predators. He asserted that an increase in the number of young males in the U.S. population would "put an estimated 270,000 more young predators on the streets" by 2010, resulting in what he called a probable surge in the "number of young black criminals" as the "black crime rate, both black-on-black and black-on-white, is increasing." John J. DiIulio, Jr., *My Black Crime Problem, and Ours: Why Are So Many Blacks In Prison? Is the Criminal Justice System Racist? The Answer is Disquieting.*, City Journal, Spring 1996, at 1, *available at* http://www. city-journal.org/printable.php?id=62 [hereinafter DiIulio, *My Black Crime Problem*].[20]

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[20] Professor DiIulio was not alone in feeding the racial criminalization of youth and the public perception of an

Professor DiIulio posited that "as many as half of these juvenile super-predators could be young black males." *Id.*[21] Professor DiIulio also confined his super-predator to urban areas predominantly inhabited by people of color. He warned that "the trouble will be greatest in black inner-city neighborhoods" and that "the demographic bulge of the next 10 years will unleash an army of young male predatory street criminals who will make even

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impending spike in juvenile crime rates. Another example was Dr. Frederick Goodwin, the Director of the Alcohol, Drug Abuse and Mental Health Administration, who in 1992:

> called for a "Violence Initiative" to study violence in the inner cities. In choosing to focus on children of the inner city, Dr. Goodwin suggested . . . that violence had a genetic component; [that] some individuals were more vulnerable to violent impulses; [that] these individuals could be identified at a young age; and [that] such vulnerability might be traced to inferior social structures, so that "maybe it isn't just careless use of the word when people call certain areas of certain cities jungles. He also referred to male monkeys who were both hyper-aggressive and hypersexual.

Rutherford, *supra*, at 723 (citations omitted).

[21] Professor DiIulio's predictions were steeped in racial overtones:

> My black crime problem, and ours, is that for most Americans, especially for average white Americans, the distance is not merely great but almost unfathomable, the fear is enormous and largely justifiable, and the black kids who inspire the fear seem not merely unrecognizable but alien. . . . [S]ome of these children kill, rape, maim, and steal without remorse.

DiIulio, *My Black Crime Problem*, *supra*, at 4.

the leaders of the Bloods and Crips . . . look tame by comparison." DiIulio, *Super-Predators*, *supra*, at 1, 3.

Similarly, in a 1996 report to then-U.S. Attorney General Janet Reno, Dean James Alan Fox of Northeastern University's College of Criminal Justice warned of a "future wave of youth violence" due to a population increase in the number of 14-17 year old African-American males that would begin in 2005 and "continue to expand well into the next century, easily surpassing the population levels of twenty years ago." James Alan Fox, U.S. Dep't of Justice, Bureau of Justice Statistics, *Trends In Juvenile Violence: A Report to the United States Attorney General on Current and Future Rates of Juvenile Offending* 3 (1996). According to Fox, this demographic change alone ensured an increase in the number of "teen killers." *Id.*

These reports were widely accepted as fact despite the lack of evidentiary support, a phenomenon detailed by U.S. Surgeon General in 2001, David Satcher, who at that time wrote that:

> [O]nly a few years ago, substantial numbers of leading experts involved in the study and treatment of youth violence had come to a strikingly different conclusion [about the effectiveness of programs to curtail youth violence]. Many were convinced then nothing could be done to stem a tide of serious youth violence that had erupted. . . ."

Office of the Surgeon Gen., *Youth Violence: A Report of the Surgeon General* Preface (2001), *available at* http://www.surgeongeneral.gov/library/youthviolence/toc.html. In fact, the super-predator myth gained

widespread acceptance throughout the 1990s, and the term was popularized by politicians, law enforcement officials, media outlets and the public. Joseph Margulies, *Deviance, Risk, and Law: Reflections on the Demand for the Preventive Detention of Suspected Terrorists*, 101 J. Crim. L. & Criminology 729, 746-749 (2011); *see also supra* note 17; Gary Marx, *Young Killers Remain Well-Publicized Rarity: "Superpredators" Fail To Grow Into Forecast Proportions*, Chi. Trib., Feb. 11, 1998, at 1; Caldwell, *supra*, at 68.

As detailed by the submission of Academic Amici, the predictions of a new wave of super-predators never came to pass. Rather than increasing, the juvenile crime rate "dropped by more than half," thus discrediting the super-predator theory and causing Professor DiIulio to concede that "he wished he had never become the 1990's intellectual pillar for putting violent juveniles in prison and condemning them as 'superpredators.'" Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19. Surgeon General Satcher's 2001 report rejected the super-predator myth, stating that:

> "[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years. The increased lethality resulted from gun use, which has since decreased dramatically. There is no scientific evidence to document the claim of increased seriousness or callousness."

Office of the Surgeon Gen., *supra*, at Chapter 1,

Myths About Youth Violence; *see also id.* at Chapter 3, Superpredators? (describing inaccuracies which wholly undermined the super-predator myth). The Surgeon General's report also repudiated the racial mythology that youth of color, and African-American and Latino youth in particular, were more likely to become involved in youth violence. *Id.* at Chapter 1, Myths About Youth Violence, Chapter 2, Prevalence of Violent Behavior (noting that while racial differences in arrest rates exist, "[t]here are essentially no differences by race in the prevalence rates for serious self-reported violent behavior."); *see also id.* at Chapter 3, Cumulative Prevalence. Thus, the predictions regarding the rise of violent crime among youth, and in particular youth of color, were proven false by a sober reflection on the actual youth crime rate. [22]

3. The Legislators.

The legislative response to the myth of rampant violence by children of color changed the course of juvenile justice and provided a framework for the treatment of children that undermined the mitigating value of youth. Indeed, significant changes to state laws were made in response to the panic around juvenile crime. Laws were enacted to

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[22] *See also* Zimring, *Youth Violence Epidemic*, *supra*, at 728 (finding that "there never was a general pattern of increasing adolescent violence in the 1980s and 1990s" and that "there is no basis for making any projections fifteen years forward based on [then] current trends"); David Westphal, *Predicted Teenage Crime Wave Failed to Occur, Numbers Show*, Fresno Bee, Dec. 13, 1999, at A12 (detailing fact that predicted crime youth crime wave never happened); Editorial, *Children's Court: Back to the Future*, Chi. Trib., July 25, 1999, at 16 (same).

ease the prosecution of children in adult court and increase the range of harsh criminal sanctions faced by criminally involved youth, including life without parole sentences. "Racial imagery and racially biased political appeals played an important role in creating the climate that led to the enactment of this legislation." Beale, *Two Waves of Juvenile Justice*, *supra*, at 514. The racial appeals that led to exposure to harsh sentencing practices were rooted in the long-standing, widespread and faulty racial stereotypes that presume youth of color are prone to violence and criminality and pose a threat to public safety. Nunn, *supra*, at 709-710.

Politicians relied on the racially-charged, super-predator narrative and what proved to be inaccurate predictions about impending juvenile crime rates to "pursue genuine get-tough law-enforcement strategies against the super-predators." DiIulio, *Super-Predators*, *supra*, at 6.[23] Many adopted the racially-laden super-predator mantle popularized by Professor DiIulio. Indeed, the misguided language became so ubiquitous that then-presidential

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[23] For example, following the Central Park jogger incident, Manhattan Borough President and mayoral candidate David Dinkins advocated for an "antiwilding law" with enhanced penalties for anyone who committed a crime as part of a group, mayoral candidate Rudolph Giuliani called for harsh measures to "combat mindless violence perpetrated by marauding gangs on 'wilding' sprees," and Mayor Ed Koch pressed for the "death penalty in incidents of wilding." Welch, *supra*, at 10. Likewise, Professor DiIulio noted that "no one in academia is a bigger fan of incarceration than I am" and estimated that the United States would need to "incarcerate at least 150,000 juvenile criminals" in the years following his 1996 article. DiIulio, *Super-Predators*, *supra*, at 6.

candidate Senator Bob Dole proclaimed in a 1996 radio address that "[u]nless something is done soon, some of today's newborns will become tomorrow's super-predators — merciless criminals capable of committing the most vicious acts for the most trivial of reasons." *Dole Seeks to Get Tough on Young Criminals*, L.A. Times, July 7, 1996, at A16. In 1996, Senator John Ashcroft, who later became U.S. Attorney General, testified before a Senate Subcommittee on Youth Violence, that "[i]n America today, violent juvenile predators prowl our businesses, schools, neighborhoods, homes and parking lots, leaving in their wake maimed bodies, human carnage and desecrated communities." S. 1425, *The Violent and Hard-Core Juvenile Offender Reform Act*, Opening Statement of Sen. John Ashcroft before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary (May 9, 1996).[24] Others spoke to the sentiments that animated the super predator narrative. As U.S. Senator from Illinois, Carol Moseley-Braun supported punitive measures for youth, noting that such tactics were

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[24] Florida Representative William McCollum, who wrote and unsuccessfully supported the Violent Youth Predator Act of 1996, also used racially charged language to drive harsh punishments for youth. The proposed Act, in part, mandated adult federal prosecution of 13 and 14 year olds for violent crimes or major drug trafficking offenses. Representative McCollum relied exclusively on the myth of the super-predator in proposing the legislation. The Executive Summary warned of the "[c]oming [s]torm of [v]iolent [j]uvenile [c]rime" and declared that "[n]o population poses a larger threat to public safety than young adult criminals." H.R. 3565, *The Violent Youth Predator Act of 1996*, Statement of Rep. William McCollum before the Subcomm. on Crime of the H. Comm. on the Judiciary (June 27, 1996).

necessary because of "a new category of offender" she described as children "who[ ] have no respect for human life [and] are arming themselves with guns and roaming the streets."[25] President Bill Clinton called juvenile crime the "ultimate threat to our country,"[26] and described it as a top law enforcement priority, warning in 1997 that "we've got about six years to turn this juvenile-crime thing around or our country is going to be living in chaos."[27]

The state legislative response was unprecedented. In nearly one-third of the states, laws were enacted to redefine the purpose of their juvenile courts to "emphasize public safety, certain sanctions, and/or the accountability of offenders." Beale, *Two Waves of Juvenile Justice*, *supra*, at 521. Between 1992 and 1997, nearly every state changed its laws to ease the transfer of youth into adult court and subject children to exceedingly harsh penalties, including life without parole. John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 Fed. Sent'g. Rep. 87 (2010). Forty-seven states and the District of Columbia made substantive changes to state laws concerning juvenile justice,

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[25] Sen. Carol Moseley-Braun, *Should 13-Year-olds Who Commit Crimes with Firearms Be Tried as Adults? Yes: Send a Message to Young Criminals*, 80 A.B.A. J. 46 (Mar. 1994).

[26] Earle Ofari Hutchinson, *Teen Crisis Not All Bad News*, Chi. Trib., Aug. 14, 1997, at 23 (internal quotation marks omitted).

[27] Jonathan Peterson, *Gangs, Youth Crimes Target of Major Effort: Clinton Says Juveniles Top Enforcement Priority*, Contra Costa Times, Feb. 20, 1997, at B1 (internal quotation marks omitted).

including changes that broadened juvenile jurisdiction and increased sentences. Torbet, *supra*, at 59. Prosecutors were granted unfettered discretion to try youth in adult courts and subject the accused to adult sanctions like life without parole. Beale, *Two Waves of Juvenile Justice*, *supra*, at 521. Critically, as detailed by the Academics Amici, these measures were not responsible for the decline in juvenile crime or homicide rates.[28]

The federal legislative response to the rise of the so-called teen super-predator provides significant insight into how the racialized criminalization of youth infected the legislative process. An analysis of 16 congressional hearings on youth violence, held between 1995 and 2001, reveals a clear distinction between discourse around racially-tainted gang violence[29] and the rash of school shootings that took place in predominantly white, suburban schools.

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[28] *See also supra* note 9; Elizabeth Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 La. L. Rev. 35, 37, 56 (2010) (noting "that studies that have examined the impact of the adoption of punitive policies on youth crime rates yield mixed results, offering little support for the claim that the declining crime rates are largely due to the enactment of harsher laws" and that "[t]he evidence that the reforms have contributed to the decline in crime rates is weak.").

[29] Historically, criminally involved youth of color have been characterized as gang members, thereby attaching a silent racial meaning to the term. Rutherford, *supra*, at 720-21; *see also* Linda S. Beres & Thomas D. Griffith, *Demonizing Youth*, 34 Loy. L.A. L. Rev. 747, 763 (2001) (discussing the close association between gang membership and minority youth used by politicians and commentators to deal in implicit racial terms.).

Elizabeth Brown, *Crime, Governance, and Knowledge Production: The "Two Track Common-Sense Approach" to Juvenile Criminality in the United States*, 36 Soc. Just. 102 (2009), *available at* 2009 WLNR 25016000 (Jan. 1, 2009). Gang violence prompted "'get-tough' legislation, punitive political rhetoric, and racialized media imagery that promote[d] fear of the urban [African-American and Latino] male." *Id.* Gang members "evidenced the emergence of a new class of violent children" created by the bad moral choices of single-parent families. *Id.* In response, legislators advocated for the use of juvenile justice and adult criminal sanctions as a means of social control to curb criminality. In contrast, in many cases, school violence demanded "the attention and therapeutic, disciplinary, and benevolent resources of state power" to intervene in the lives of children and prevent such incidents from happening again. *Id.*

Thus, the connections between race, crime and youth led to punitive sanctions, like life without parole, for young offenders. Sinister beliefs about race, crime and age erased the longstanding distinction between youth and adults, rendering the sentencing practice currently before this Court unconstitutional.

III. Consistent with Their History, Juvenile Life Without Parole Laws Are Overwhelmingly Imposed Upon Children of Color.

The pernicious influence of racial stereotypes about youth of color, and the punitive crime legislation borne from those stereotypes, is evident

from the stark racial disparities in the practice of juvenile life without parole sentencing. Based on available data, it appears that African-American youth nationwide serve life without parole sentences "at a rate that is ten times higher than white youth (the rate for black youth is 6.6 as compared with .6 for white youth)." Amnesty Int'l & Human Rights Watch, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* 39 (2005), *available at* http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf [hereinafter AI/HRW, *Rest of Their Lives*]; *see also* Connie de la Vega & Michelle Leighton, *Sentencing Our Children To Die in Prison: Global Law and Practice*, 42 U.S.F.L. Rev. 983, 993 (2008). Though African Americans comprise only 16% of the national youth population,[30] the available data reveals that African Americans make up 60% of all youth serving life without parole sentences, AI/HRW, *Rest of Their Lives*, *supra*, at 39. According to this same data, "the rate for black youth sentenced to life without parole" exceeds that of white youth in every state with juvenile life without parole. *Id.* at 42.

Racial disparities in juvenile life without parole sentences are not surprising given that these disparities exist at all levels of children's contact with the criminal justice system. *See* Feld, *Unmitigated Punishment*, *supra*, at 35-38. "When racial/ethnic disparities do occur, they can be found

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[30] Charles Puzzanchera & Benjamin Adams, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Arrests 2009*, Juvenile Offenders and Victims: National Report Series. Dec. 2011, at 6, *available at* www.ojjdp.gov/pubs/236477.pdf.

at any stage of processing within the juvenile justice system. Research suggests that disparity is most pronounced at arrest, the beginning stage, and that when racial/ethnic differences exist, their effects accumulate as youth are processed through the justice system." Howard N. Snyder & Melissa Sickmund, U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Offenders and Victims: 2006 National Report* 188 (Mar. 2006), *available at* http://www.ojjdp.gov/publications/pubabstract.asp?pubi=234394. Thus, although African Americans comprise only 16% of the youth population, they make up:

- 28% of juvenile arrests;
- 30% of referrals to juvenile court;
- 37% of the detained population;
- 34% of youth formally processed by the juvenile court;
- 30% of adjudicated youth;
- 35% of youth judicially waived to criminal court;
- 38% of youth in residential placement; [and]
- 58% of youth admitted to state adult prison.

Nat'l Council on Crime & Delinquency, *And Justice for Some: Differential Treatment of Youth of Color in the Justice System* 37 (Jan. 2007), *available at* http://www.nccd-crc.org/nccd/pubs/2007jan_justice_for_some.pdf; *see also* Snyder & Sickmund, *supra*, at 176 (providing data on black youth's

"disproportionate share of cases at all stages of case processing" in 2002).

Indeed, "[t]hroughout the [criminal justice] system, youth of color – especially African American youth – receive different and harsher treatment. This is true even when White youth and youth of color are charged with similar offenses." Nat'l Council on Crime & Delinquency, *supra*, at 37; *see also* Feld, *Unmitigated Punishment*, *supra*, at 36 ("After researchers control for present offense and prior record, . . . studies consistently report additional racial disparities when judges sentence black youths."); AI/HRW, *Rest of Their Lives*, *supra*, at 39 (noting research finding that "minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system, from the point of arrest to sentencing").[31] In a study of youth arrested for murder in 25 states where there was available data, African Americans were found to be sentenced to juvenile life without parole at a rate that is 1.59 times higher than white youth. Human Rights Watch, *The Rest of Their*

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[31] A study of 77,236 individuals sentenced under the federal sentencing guidelines demonstrates the severe racial disparities in sentencing people of color. *See* David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & Econ. 285 (2001). On average, African Americans in this study received sentences that were 99.6% longer than sentences for whites. *Id.* at 296. Latinos' sentences were 68.5% longer. *Id.* Even when controlling for offense level, criminal history, district of conviction, and offense type, African Americans, Latinos, and other minorities had federal criminal sentences that were, respectively, 5.5, 4.5, and 2.3 months longer than their white counterparts. *Id.* at 300.

Lives: Life without Parole for Youth Offenders in the United States in 2008 6-7 (May 2008), *available at* http://www.hrw.org/sites/default/files/reports/the_rest_of_their_lives_execsum_table.pdf.

The racial disparities with respect to juvenile life without parole for homicide offenses are especially troubling given the steady decline of murders committed by children in the past two decades. Since 1993, the juvenile arrest rate for murder "fell substantially through 2000, resting at a level that essentially remained constant for the entire decade. Compared with the prior 20 years, the juvenile murder arrest rate between 2000 and 2009 has been historically low and relatively stable." Puzzanchera & Adams, *supra*, at 9. This decline was mirrored by the juvenile murder arrest rate of African-American youth, which "fell . . . considerably more" than the rate of white youth from 1994 through 2000, though it increased 10% in the past decade. *Id.*

IV. Proper Evaluation of Culpability Has Been Undermined by the Racially Charged Criminalization of Youth of Color.

A proper evaluation of culpability is a fundamental component of a constitutional sentence under the Eighth and Fourteenth Amendments. History reveals that racial stereotypes helped to propel the implementation of the laws allowing for juvenile life without parole sentences, and research establishes that children of color are sentenced to life without parole at markedly disproportionate rates. Because it is clear that race critically and inappropriately informs the assessment of blameworthiness in the context of juvenile life

without parole sentencing, such sentences are unconstitutional.

As detailed above, the racialized criminalization of youth fostered exposure to more punitive sanctions, like life without parole, for children. These harsh punishments had previously been reserved for adult offenders in the criminal justice system. "As the blurring of the line between juvenile and criminal court increases, so does the likelihood that these trends" – like life without parole – "will disproportionately affect youth of color." Nat'l Council on Crime & Delinquency, *supra*, at 37. Adult criminal sanctions for juveniles, and the faulty link between race and crime that drives them, diminished the mitigating value of youth and, therefore, undermined an accurate consideration of culpability required in sentencing.

Youthfulness unquestionably has a bearing on culpability; this Court's precedents recognize the differences between youth and adults and the diminished culpability of juvenile offenders.[32] But the racial stereotypes animating the laws that allow

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[32] *See Graham*, 130 S. Ct. at 2026-27; *Roper*, 543 U.S. at 569-70; *see also J.D.B.*, 131 S. Ct. at 2403-04 (detailing this Court's precedents describing differences between youth and adults); *Thompson v. Oklahoma*, 487 U.S. 815, 834-35 (1988) (O'Connor, J., concurring) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. . . . The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.") (citations and internal quotation marks omitted); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (discussion of children less responsible than adults).

life without parole sentences for children – and the racially disproportionate implementation of these extreme sentences – demonstrate that children of color are less likely to receive the "benefit" of youth in the context of sentencing for serious crimes. The race-based, super-predator narrative itself is "the antithesis of childhood;" thus, the policies it wrought treat youth accordingly. Nunn, *supra*, at 713.

Social science studies confirm the pernicious impact of racial stereotypes that characterize the juvenile, super-predator narrative. In one study, researchers activated negative stereotypes about juvenile offenders of color in the minds of 200 police and probation officers. Sandra Graham & Brian S. Lowery, *Priming Unconscious Racial Stereotypes About Adolescent Offenders*, 28 L. Hum. Behav. 483, 488-95 (2004). Ultimately, the researchers found that "unconscious biases trigger the belief that [African-American adolescent offenders] are adult-like and therefore as blameworthy as adults who commit similar crimes." *Id.* at 500. Police officers were "less likely to judge the offender as immature (by virtue of adolescence) and more likely to perceive him as culpable and deserving of punishment." *Id.* at 494. Moreover, the research demonstrated that "the more culpable an offender was perceived to be, the greater the endorsed punishment." *Id.* at 498.[33]

Another study, which examined probation

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[33] The "automatic stereotype activation does not require perceivers to endorse the stereotype, to dislike African Americans, or to hold any explicit prejudice toward that group. Even decision makers with good intentions are susceptible." *Id.* at 499.

officers' narrative reports concerning sentencing recommendations for youth offenders, also confirmed that race undermined culpability determinations. *See* Bridges & Steen, *supra*, at 557-58. The researchers analyzed what the probation officers deemed the cause of the youth's criminal behavior and found that "officers describe[d] black and white youths differently, referring to negative personality traits for black youths and more negative environmental influences for whites." *Id.* at 561. "[B]lack youths were judged [by probation officers] to have a higher risk of reoffending than . . . white youths." *Id.* Moreover, researchers found that "[b]eing black significantly reduces the likelihood of negative *external* attributions," such as peer groups, family dysfunction and drug abuse, "and significantly increases the likelihood of negative *internal* attributions, even after adjusting for severity of the presenting offense and the youth's prior involvement in criminal behavior." *Id.* at 563-64 (emphasis in original). The perceived negative personality traits of African-American and other youth of color led officials to assess them as more culpable and dangerous than white youth and, therefore, to recommend more severe sentences for youth of color. *Id.* at 567.

In light of the preceding arguments, the possibility that race may play any role in the administration of justice is especially disturbing in the context of life without parole sentences for youth. This Court has recognized the unique severity of such sentences, which "alter[ ] the offender's life by a forfeiture that is irrevocable." *Graham*, 130 S. Ct. at 2027. At bottom, the gross racial disparities that

pervade life without parole sentencing for children demonstrate that negative perceptions of youth of color have stymied the proper evaluation of their culpability. As detailed in Section I, race cannot play any role in the imposition of criminal sanctions. The influence of race on the sentencing of youth to life without parole, therefore, invalidates and renders unconstitutional the practice of sentencing children to die in prison.

CONCLUSION

The current sentencing structure that imposes life without parole sentences on youth offenders was borne out of racially charged stereotypes about children of color. While these stereotypes have been proven false, they have nevertheless undermined the constitutionally mandated evaluation of a youth's culpability. This is demonstrated by stark racial disparities for children caught within the criminal justice system and subsequently sentenced to life without parole. Under such circumstances, the substantial risk of imposing excessive sentences on children calls into question the constitutionality of the most extreme sentence currently available to them. For these reasons, in addition to those raised by Petitioners and their supporting amici, this Court should categorically bar all children under the age of 18 from receiving life without parole sentences.

Respectfully submitted,

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January 17, 2012

ADDENDUM

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans and others who are unable, on account of poverty, to employ legal counsel to secure their rights to equal protection under the law. LDF has a long-standing concern with the impact of racial discrimination on the criminal justice system. It has served as counsel of record and/or as amicus curiae in this Court in, *inter alia*, *Graham v. Florida*, 560 U.S. __, 130 S.Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Batson v. Kentucky*, 476 U.S. 79 (1986); *McClesky v. Kemp*, 481 U.S. 279 (1987); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Furman v. Georgia*, 408 U.S. 238 (1972); and *Swain v. Alabama*, 380 U.S. 202 (1965).

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. The CHHIRJ marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers to focus on, among other things, reforming criminal justice policies.

LatinoJustice PRLDEF was founded in 1972 as the Puerto Rican Legal Defense and Education Fund and is one of the nation's leading civil rights public interest law offices that represents Latinas and Latinos throughout the Eastern seaboard and works

to increase their entry into the legal profession. LatinoJustice PRLDEF has a strong interest in addressing civil rights and human rights violations within the Latino communities of the United States and uses the courts to rectify these abuses. Accordingly, it has an interest in the juvenile justice matters presented in this litigation and their effects on Latino youth.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. The racially discriminatory and barbaric treatment of juveniles by the criminal justice system threatens the rights of Asian Americans and all Americans.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that is as good as its ideals, and towards this end, opposes the sentencing of juveniles to life without parole, a practice in violation of the Eighth Amendment's bar against cruel and unusual punishment. Fairness and equality in the administration of justice is a fundamental civil and

human right, but the extreme racial disparities that exist within the criminal justice system denies this right to the most vulnerable segments of society, including minorities and youth. In order to advance its mission, The Leadership Conference is dedicated to eliminating all forms of discrimination from our criminal justice system, and as such, has a vital interest in the outcome of this case.

AMICUS CURIAE BRIEF

Nos. 10-9646 & 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writs of Certiorari to the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas

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BRIEF OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

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February 21, 2012

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 4

The Eighth Amendment Does Not Establish The Categorical Rule That A 14-Year-Old Convicted Of Homicide May *Never*, Under *Any* Circumstances, Be Sentenced To Life Without Parole. 4

A. There Is No Societal Consensus Against The Sentence Of Life Without Parole For 14-Year-Olds Convicted Of Homicide. 4

1. Statutes That Authorize Particular Punishments Reflect Legislative Judgments That Those Punishments Are Appropriate. 6

2. The Frequency With Which Particular Punishments Are Imposed Does Not Necessarily Reflect Societal Judgments About Those Punishments. 11

B. The Categorical Rule Proposed By Petitioners Would Transform The Eighth Amendment Into A National Code Of Juvenile Justice. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama v. Jones,
No. CC-2000-0151 (Cir. Ct. of Jefferson Cty., Ala., May 25, 2001) (unpublished) 15

Angel v. Virginia,
704 S.E.2d 386 (Va. 2011) 18

Arizona v. Kasic,
265 P.3d 410 (Ariz. Ct. App. 2011) 18

Brecht v. Abrahamson,
507 U.S. 619 (1993) 17

Douglas v. City of Jeannette,
319 U.S. 157 (1943) 20

Engle v. Isaac,
456 U.S. 107 (1982) 17

Graham v. Florida,
130 S. Ct. 2011 (2010) 2, 4, 10, 12, 18, 20

Gregg v. Georgia,
428 U.S. 153 (1976) 5

Harmelin v. Michigan,
501 U.S. 957 (1991) 2, 4

Kennedy v. Louisiana,
554 U.S. 407 (2008) 9

Lockyer v. Andrade,
538 U.S. 63 (2003) 18

Mistretta v. United States,
488 U.S. 361 (1989) 2

Penry v. Lynaugh,
492 U.S. 302 (1989) 5

Postelle v. Florida,
383 So. 2d 1159 (Fla. Dist. Ct. App. 1980) 18

Roper v. Simmons,
543 U.S. 551 (2005) 3, 9, 10, 20

Solem v. Helm,
463 U.S. 277 (1983) 2, 4

Thomas v. Florida,
No. 1D10-1613, __ So. 3d __, 2011
WL 6847814 (Fla. Dist. Ct. App. Dec. 30, 2011) ... 18

Torres v. Delaware,
608 A.2d 731 (Del. 1992) (unpublished) 14

United States v. Booker,
543 U.S. 220 (2005) 2

Weems v. United States,
217 U.S. 349 (1910) 4

Statutes and Rules

18 U.S.C. § 1091 12

18 U.S.C. § 175 12

18 U.S.C. § 1751 12

18 U.S.C. § 229 12

18 U.S.C. § 2381 12

18 U.S.C. § 32 12

18 U.S.C. § 351(a) 12

Ala. Code § 12-15-203 8

Ala. Code § 12-15-203(d)(5) 16

Conn. Gen. Stat. § 46(b)-127 8

Ga. Code § 15-11-28(b)(2)(A)(i) 8

Idaho Code § 20-509(1)(a) 8

Mass. Gen. Laws ch. 119 § 74 8

Md. Cts. & Jud. Proc. Code § 3-8A-06 8

N.D. Cent. Code § 27-20-34(1)(b) 8

N.J. Stat. § 2A:4A-26(a)(2)(a) 8

Ohio Rev. Code § 2152.12 8

Okla. Stat. tit. 10A, § 2-5-101(B) 8

S.C. Code § 63-19-1210(6) 8

U.S. S. Ct. Rule 37.2 1

U.S. S. Ct. Rule 37.3 1

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Jan. 5, 2004 10

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Oct. 15, 2011 10

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Reno Gazette-Journal,
Apr. 29, 2005 10

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Hunt Urges House To Pass Crime Bills,

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Mar. 9, 1994 9

Fincher, Scott M.,
Juvenile Crime Law Signed,
Chicago Tribune,
June 12, 1996 7

General Accounting Office,
Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions (1995) 7

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Houtz, Jolayne,
Hardened Kids Doing Harder Time for Crimes,
Seattle Times,
Mar. 2, 1994 9

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National Prosecution Standards (3d ed. 2009) 14

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O'Hanlon, Kevin,
Juvenile Killers Won't Get Parole,
Lincoln Journal Star,
Apr. 8, 2011 10

Puzzanchera, C. & Kang, W.,
Easy Access to the FBI's Supplementary Homicide Reports: 1980-2009 (2011) 13

Rightmer, Tracy,
Arrested Development: Juveniles' Immature Brains

Make Them Less Culpable Than Adults,
9 Quinnipiac Health L. J. 1 (2005) 19

Rossum, Ralph A.
Holding Juveniles Accountable: Reforming America's "Juvenile Injustice System",
22 Pepp. L. Rev. 907 (1995) 7

Satter, Linda,
The Kids and the Courts: Lawmakers Face Tough Balance of Crime, Punishment,
Arkansas Democrat-Gazette,
June 29, 1998 9

Stimson, Charles D. & Grossman, Andrew M.,
Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens (2009) 17

Supreme Court Decision Could Affect Louisiana Inmates,
The News-Star (Monroe, La.),
May 18, 2010 10

The Royal Society,
Brain Waves Module 4: Neuroscience & the Law (Dec. 2011) 20

U.S. Dep't of Justice,
Office of Juvenile Justice & Delinquency Prevention,
Statistical Briefing Book (Dec. 9, 2011) 12

U.S. Dep't of Justice,
Office of Juvenile Justice & Delinquency Prevention,
State Responses to Serious and Violent Juvenile Crime (1996) 7

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Zausner, Robert,
After Ridge Gets The Spotlight, Pa. Rape Victim Grips the Audience,
Phila. Inquirer,
Aug. 14, 1996 7

Pursuant to this Court's Rule 37.2, *amicus curiae* National District Attorneys Association (NDAA) respectfully files this brief in support of respondents.*

INTEREST OF *AMICUS CURIAE*

Amicus NDAA is the oldest and largest organization representing the Nation's prosecutors. Its aim is to assist prosecutors in their mission of safeguarding the public and ensuring that justice is done. Its approximately 7,000 members are responsible for enforcing the criminal laws of every State and territory. Because this responsibility includes the prosecution of juveniles who commit homicide, NDAA's members are keenly aware of the myriad circumstances under which a juvenile can become involved in a homicide. In light of this real-world experience, *amicus* urges this Court not to adopt a categorical rule of federal constitutional law that a 14-year-old convicted of homicide may *never*, under *any* circumstances, be sentenced to life without parole.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a constant tension in the law between a desire for bright-line legal rules, on the one hand, and a desire for flexible fact-specific standards, on the other. Perhaps nowhere is this tension more evident

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* The parties have globally consented to the filing of *amicus* briefs in these cases and, pursuant to Rule 37.3, letters evidencing such consent have been filed with the Clerk. In accordance with Rule 37.6, *amicus* NDAA hereby states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

than in the area of criminal sentencing, as underscored by the tortured history of the Federal Sentencing Guidelines. *See, e.g., United States v. Booker*, 543 U.S. 220 (2005); *Mistretta v. United States*, 488 U.S. 361 (1989). Over the years, the idea that criminal sentences may appropriately be imposed and assessed by reference to categorical bright-line rules, as opposed to holistic consideration of individual cases, has passed in and out of vogue. *See, e.g., Mistretta*, 488 U.S. at 363-67.

That ongoing tension is reflected in the present cases. This Court's precedents make it clear that, under the Eighth Amendment, an individual 14-year-old cannot be sentenced to life in prison without the possibility of parole, even for homicide, if that sentence is grossly disproportionate to the offense in light of all the facts and circumstances. *See generally Solem v. Helm*, 463 U.S. 277, 290 (1983); *see also Graham v. Florida*, 130 S. Ct. 2011, 2040 (2010) (Roberts, C.J., concurring in the judgment); *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment). The question presented here is whether this Court should jettison that holistic approach in favor of the bright-line rule that a 14-year-old may *never*, under *any* circumstances, be sentenced to life without parole. *Amicus* respectfully submits that the Eighth Amendment provides no warrant for any such categorical rule.

Our Constitution has endured for more than two centuries precisely because it does not purport to regulate all the many and varied details of our national life. Societal views on such matters as appropriate criminal punishments change over time, and do not ineluctably evolve in a single direction. It

is ironic that petitioners, who decry determinate bright-line rules established by legislatures to *impose* criminal sentences, are asking this Court to establish a determinate bright-line rule to *review* criminal sentences. Never in our Nation's history has this Court interpreted the Eighth Amendment as a national penal code that categorically addresses the length of prison sentences that may be meted out to those convicted of homicide. This Court should not stray from that path now.

It would be particularly inappropriate for this Court to adopt the proposed categorical rule that a 14-year-old convicted of homicide may *never* be sentenced to life without parole because there is absolutely no societal consensus against such punishment. To the contrary, petitioners themselves concede that a lopsided majority of States authorizes life without parole for 14-year-olds convicted of certain homicides. Indeed, this Court recently held that the Eighth Amendment does not allow the death penalty for juveniles convicted of homicide in part *because of* the availability of life without parole as an alternative punishment. *See Roper v. Simmons*, 543 U.S. 551, 572 (2005) ("To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."). The relative rarity of such sentences speaks to the fact that, at least in today's world, few 14-year-olds are charged with, or convicted of, homicide. But that fact provides neither reason nor license for this Court to invent a new rule of constitutional law. Under current law, as noted above, the Eighth Amendment provides an avenue for

relief if a sentence of life without parole is grossly disproportionate to the offense in a particular case. But nothing in the Eighth Amendment categorically condemns such punishment. Accordingly, this Court should affirm the judgments.

ARGUMENT

The Eighth Amendment Does Not Establish The Categorical Rule That A 14-Year-Old Convicted Of Homicide May *Never*, Under *Any* Circumstances, Be Sentenced To Life Without Parole.

The Eighth Amendment has long been construed to impose a check on freakish criminal sentences that, under all of the facts and circumstances of a particular case, are grossly disproportionate to the offense. *See, e.g.*, *Solem*, 463 U.S. at 290; *Weems v. United States*, 217 U.S. 349, 373-78 (1910); *see also Graham*, 130 S. Ct. at 2040 (Roberts, C.J., concurring in the judgment); *Harmelin*, 501 U.S. at 996-97 (Kennedy, J., concurring in part and concurring in the judgment). Accordingly, the question presented here is not whether the Eighth Amendment categorically *allows* a 14-year-old convicted of homicide to be sentenced to life without parole, but instead whether the Eighth Amendment categorically *prohibits* such a sentence. The answer to that question is no.

A. There Is No Societal Consensus Against The Sentence Of Life Without Parole For 14-Year-Olds Convicted Of Homicide.

Although the Eighth Amendment prohibition on the infliction of "cruel and unusual punishments" is hardly self-defining, it does not give judges license to

invalidate whatever punishments they, as legislators, might not have favored. To the contrary, "we may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved." *Gregg v. Georgia*, 428 U.S. 153, 175 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Thus, "those who would attack the judgment of the representatives of the people" bear the "heavy burden" of proving that a particular punishment duly authorized by law is utterly outside the mainstream of our societal norms. *Id.*

Petitioners cannot carry that burden here. As this Court has explained, the "most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). By petitioners' own count, no fewer than *39 States* authorize a sentence of life in prison without the possibility of parole for those convicted of certain homicides committed at age 14 or older. *See* Br. for Pet'r Kuntrell Jackson, No. 10-9647 (Pet'r Br.) Apps. A & B (listing state statutes). Under these circumstances, petitioners cannot possibly establish the existence of a societal consensus against such punishment.

Undaunted, petitioners discount the import of those statutes on two grounds. *First*, they argue that statutes authorizing a particular punishment for 14-year-olds do not reflect a considered legislative judgment that such punishment is appropriate for 14-year-olds. *See* Pet'r Br. 43-45. *Second*, they argue that, in practice, few 14-year-olds are sentenced to life without parole. *See id.* at 47-52. Both arguments are unavailing.

1. Statutes That Authorize Particular Punishments Reflect Legislative Judgments That Those Punishments Are Appropriate.

Petitioners first contend that this Court should ignore the widespread and recent legislation that "responded to concerns about the perceived inadequacy of the juvenile justice system to deal with violent youth crime" by "lowering the age at which children could be prosecuted in adult court." Pet'r Br. 43. Petitioners deride such legislation as "politically popular," *id.*, as if that were a negative and did not reflect the very societal consensus that petitioners now seek to deny. According to petitioners, these statutes are entitled to no weight in the Eighth Amendment analysis because "there is no evidence of any significant legislative consideration of the specific question whether lifelong imprisonment without parole is appropriate for young adolescents." *Id.* at 44.

Petitioners' argument is profoundly disrespectful of our federal system and of democracy itself. At issue here are not some archaic or outlier laws, but statutes passed very recently by a *majority* of States in response to a specific societal concern—a significant spike in violent crime by juveniles in the late 1980s and early 90s. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice Reform Initiatives in the States 1994-1996*, at 42 (1997). As a result of that spike, many reasonable people across the country concluded that the existing juvenile justice system was too lenient. *See, e.g.*, Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America's "Juvenile Injustice*

System", 22 Pepp. L. Rev. 907, 907-08 (1995). The legislative response was a "dramatic expansion" of the circumstances under which juveniles charged with violent crimes could be prosecuted as adults. *Juvenile Justice Reform Initiatives*, *supra*, at 42; *see also* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *State Responses to Serious and Violent Juvenile Crime* at iii, xv (1996); General Accounting Office, *Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions* 5 (1995).

Petitioners caricature these laws as purely technical in nature, as if they "simply regulate[d] the boundary between juvenile-court and adult-court jurisdiction." Pet'r Br. 45. But the obvious reason that States began trying juveniles in the same courts as adults was to subject juveniles to the same punishment as adults. It is fanciful to suggest that States had no clue that they would be subjecting violent juvenile offenders to adult punishment (including life without parole) by trying them as adults. Indeed, the very mantra of the juvenile-justice reform movement of the 1990s was "Adult Time for Adult Crimes." *See, e.g.*, Robert Zausner, *After Ridge Gets The Spotlight, Pa. Rape Victim Grips the Audience*, Phila. Inquirer, Aug. 14, 1996, at A13 ("[Governor] Ridge reiterated a point he had made in his speech: 'Do an adult crime, you will do adult time."); Scott M. Fincher, *Juvenile Crime Law Signed*, Chicago Tribune, June 12, 1996, at 3 ("Legislation requiring 'adult time' for 'adult crime' by juvenile offenders was signed into law Tuesday.").

The resulting state "transfer statutes" (*i.e.*, statutes that either authorize or require the transfer of juveniles to the adult-court system) do not

indiscriminately authorize or require all juveniles to be tried as adults. Rather, they draw careful legislative lines. Some transfer statutes authorize or require the transfer of juveniles charged with specific violent crimes, including homicide. *See, e.g.*, Conn. Gen. Stat. § 46(b)-127 (requiring transfer of "any child charged with the commission of a capital felony").[1] Other transfer statutes achieve the same result by authorizing or requiring the exclusion of certain violent crimes, including homicide, from juvenile-court jurisdiction. *See, e.g.*, Md. Cts. & Jud. Proc. Code § 3-8A-06 (excluding crimes that, "if committed by an adult, would be punishable by death or life imprisonment").[2] It defies reason to suggest that the legislatures that enacted these statutes failed to perceive that they were thereby subjecting violent juvenile offenders to adult punishment, including life without parole.

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[1] *See also* Ala. Code § 12-15-203 (authorizing transfer for murder and listing factors for court to consider); Ga. Code § 15-11-28(b)(2)(A)(i) (requiring transfer of minors age 13 to 17 charged with murder); Ohio Rev. Code § 2152.12 (authorizing transfer of juveniles charged with "aggravated murder, murder, attempted aggravated murder, or attempted murder"); S.C. Code § 63-19-1210(6) (authorizing transfer of juveniles charged with murder); Va. Code § 16-1-269.1(B), (C) (requiring hearing on transfer when juvenile is charged with murder); W. Va. Code § 49-5-10(d)(1) (requiring transfer if the court finds probable cause that juvenile committed murder).

[2] *See also* Idaho Code § 20-509(1)(a) (excluding "murder of any degree or attempted murder"); Mass. Gen. Laws ch. 119 § 74 (excluding "murder in the first or second degree"); N.J. Stat. § 2A:4A-26(a)(2)(a) (excluding "[c]riminal homicide other than death by auto"); N.D. Cent. Code § 27-20-34(1)(b) (excluding murder and attempted murder); Okla. Stat. tit. 10A, § 2-5-101(B) (excluding any person aged 13 through 17 "who is charged with murder").

In any event, contrary to petitioners' assertion, *see* Pet'r Br. 44, there is ample evidence that States were well aware that authorizing or requiring certain violent juvenile offenders to be tried as adults could lead to a sentence of life without parole. "[A]lthough state legislatures typically do not create legislative materials like those produced by Congress," *Kennedy v. Louisiana*, 554 U.S. 407, 452-53 (2008) (Alito, J., dissenting), there can be no doubt that the public (not to mention the legislators themselves) understood that this was both the intent and the effect of the expanded transfer statutes. *See, e.g.*, Linda Satter, *The Kids and the Courts: Lawmakers Face Tough Balance of Crime, Punishment*, Arkansas Democrat-Gazette, June 29, 1998, at A1 ("Under this proposal, a person 13 or younger could serve life in prison without parole if convicted of capital murder in adult court."); Jolayne Houtz, *Hardened Kids Doing Harder Time for Crimes*, Seattle Times, Mar. 2, 1994, at A1 (describing Washington legislative proposals that would "transfer anyone 14 or older who commits a violent offense while armed with a firearm into adult court" and noting that juvenile defendants tried as adults could be sentenced to life without parole); Jay Euban, *Hunt Urges House To Pass Crime Bills*, News & Record (Greensboro, N.C.), Mar. 9, 1994, at B1 (listing various crime bills enacted or under consideration by the North Carolina legislature, including legislation to "[t]ry violent juveniles as adults" and impose "[l]ife without parole for 1st Degree Murder").

Indeed, in the years before *Roper*, legislative debates about the death penalty for juveniles often focused on the availability of life without parole as an alternative sentence. *See, e.g.*, Anjeanette Damon,

Senate Vote Abolishes Juvenile Death Penalty, Reno Gazette-Journal, Apr. 29, 2005, at A1 (describing proposed Nevada legislation to replace juvenile death penalty with life without parole); Associated Press, *Juvenile Death Penalty Bill Heads to Legislature*, Jan. 5, 2004 (quoting Wyoming legislator sponsoring bill to replace juvenile death penalty with life without parole: "We're not taking away prisons or life without parole."). Petitioners themselves, as they must, concede this linkage. *See* Pet'r Br. 46 n.54 (citing statutes that replaced the juvenile death penalty with life without parole).

The absence of a societal consensus against the punishment of life without parole for juveniles convicted of homicide is equally illustrated by unsuccessful efforts to repeal that penalty. Thus, in recent years, the Florida, Nebraska, and Louisiana legislatures have expressly considered, and rejected, bills to allow parole for juveniles sentenced to life for homicide. *See, e.g.*, Gary Blankenship, *Criminal Law Section Supports Review of Death Penalty Process*, Florida Bar News, Oct. 15, 2011, at 1 ("Lawmakers earlier this year considered a bill that would provide parole review for life-sentenced juveniles, but it failed."); Kevin O'Hanlon, *Juvenile Killers Won't Get Parole*, Lincoln Journal Star, Apr. 8, 2011 (reporting on failure of bill that would have allowed parole for juveniles convicted of homicide despite sponsor's argument that "the rationale" behind *Graham* and *Roper* requires the possibility of parole in such cases); *Supreme Court Decision Could Affect Louisiana Inmates*, The News-Star (Monroe, La.), May 18, 2010 ("Coinciding with the court's decision [in *Graham*], is a bill making its way through the state Legislature to revisit life without parole for any juvenile, including

those found guilty of a homicide."); SB494-2010 Regular Session, *available at http://legis.la.gov/billdata/History.asp?sessionid=10RS&billid=SB494* (last visited Feb. 21, 2012) (reporting failure of Louisiana bill). Needless to say, if there truly were a societal consensus against life without parole for juveniles convicted of homicide, the failure of these bills would be inexplicable, as would the United States' staunch opposition to "a resolution in the United Nations General Assembly calling on all states to abolish life sentences without parole for juveniles." Pet'r Br. 51. Let there be no mistake about what is really going on here: petitioners are trying to achieve by federal judicial fiat what they have failed to achieve through the democratic process.

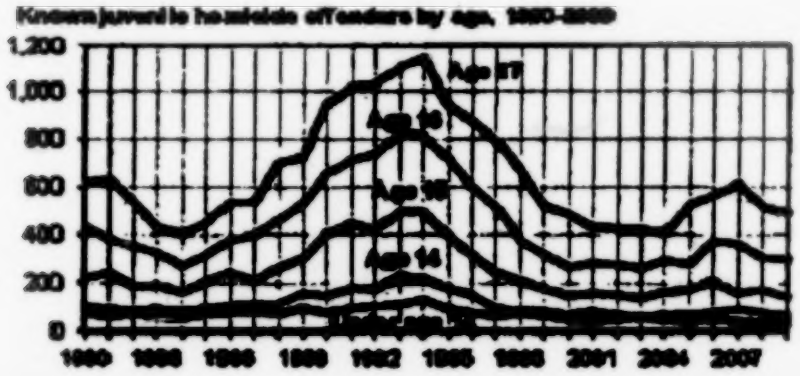
2. The Frequency With Which Particular Punishments Are Imposed Does Not Necessarily Reflect Societal Judgments About Those Punishments.

Petitioners next assert that this Court should ignore the widespread and recent legislation authorizing life without parole for 14-year-olds convicted of homicide on the ground that, "in actual practice," the imposition of such punishment "is an aberrant, exceedingly rare occurrence." Pet'r Br. 47 (capitalization modified). Petitioners base that assertion on the proposition that, by their own unofficial count, "[t]here are only about 79 persons in the United States under life-without-parole sentences for offenses committed at age 13 or 14." *Id.* According to petitioners, this alleged number—in and of itself—"evidences nationwide repudiation, not

acceptance, of the sentence for children of these young ages." *Id.*

That argument is a *non sequitur*. As this Court explained in *Graham*, discussion of the absolute number of persons subjected to a particular sentence is meaningless without consideration of the "base number of certain types of offenses." 130 S. Ct. at 2025. There are many grave offenses for which few—if any—persons have ever been convicted or punished. *See, e.g.*, 18 U.S.C. § 1751 (assassination of the President or Vice-President); 18 U.S.C. § 351(a) (assassination of a member of Congress or Justice of the Supreme Court); 18 U.S.C. § 32 (destruction of an aircraft); 18 U.S.C. § 1091 (genocide); 18 U.S.C. § 2381 (treason); 18 U.S.C. § 175 (possession or development of biological weapons); 18 U.S.C. § 229 (possession or development of chemical weapons). That does not establish a societal consensus against punishing persons who have committed, and been convicted of, such offenses; rather, it simply shows that few, if any, persons have committed, and been convicted of, such offenses in the first place.

Thus, the number of 14-year-olds who have been sentenced to life without parole for homicide reflects nothing so much as the fact that, thankfully, relatively few 14-year-olds commit homicide. According to Justice Department statistics, over the past thirty years, on average just 176 persons age 14 and younger per year have been reported as homicide offenders in our country of more than 300 million people. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Statistical Briefing Book* (Dec. 9, 2011), *available at* http://www.ojjdp.gov/ojstatbb/offenders/qa03104.asp?qaDate=2009 (last visited Feb. 21, 2012).



And, as might be expected, the numbers vary widely by region.[7] Thus, in each of five States (Maine, New Hampshire, North Dakota, Vermont, and Wyoming) only 15 or fewer persons age 17 and younger are reported to have committed homicides over the *entire* 15-year period from 1994 to 2009 (these statistics do not break down the data for persons 14 and younger). *See* C. Puzzanchera & W. Kang, *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2009* (2011), *available at* http://ojjdp.gov/ojstatbb/ezashr/ (last visited Feb. 21, 2012).

Indeed, far from showing that the current system is broken, the fact that relatively few 14-year-olds have been sentenced to life without parole only confirms that the system is working perfectly well. Prosecutors do not charge every juvenile potentially eligible for life without parole with a crime that might trigger that sentence. To the contrary, prosecutors exercise discretion in their charging decisions, taking into account such factors as the defendant's age and relative culpability. To assist prosecutors in the exercise of this responsibility, *amicus* NDAA has published guidelines addressing a variety of factors to be considered, including "[t]he juvenile's age, maturity, and mental status" as well as the seriousness of the offense, the juvenile's role in

the offense, prior criminal history, and threat to the community. National District Attorneys Association, *National Prosecution Standards* 64-68 (3d ed. 2009); *see also* National District Attorneys Association, *Resource Manual & Policy Positions on Juvenile Crime Issues* (2002) ("The primary factors" influencing charging decisions are "the seriousness of the crime, the threat to public safety, the offender's criminal history, the certainty of appropriate punishment, *and the age and maturity of the offender*.") (emphasis added).

Along with the relatively small number of 14-year-olds who commit homicide in the first place, the fact that professional prosecutors exercise restraint in their charging decisions helps explain the relatively small number of persons currently serving life without parole for homicides committed at age 14. Based on their real-world experience, prosecutors are keenly aware of the myriad circumstances under which a juvenile can become involved in a homicide, and typically charge only the most egregious juvenile offenders with crimes that could lead to such a severe sentence. Two recent examples illustrate the point.

Donald Torres.[3] One night, while his neighbors were asleep, 14-year-old Donald Torres entered their home, doused it with kerosene, and ignited it. All four members of the family, including two children aged four and one, perished in the ensuing fire. Torres planned the attack earlier in the day, when he spotted a can of kerosene on the victims' porch and selected it as the murder weapon. Torres ensured

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[3] Telephone interview with Paul R. Wallace, Chief of Appeals, Delaware Department of Justice (Jan. 30, 2012); *see also Torres v. Delaware*, 608 A.2d 731 (Del. 1992) (unpublished).

that the family's only exit, a stairwell, was primed to explode in flame to prevent the victims from escaping. From outside the home, Torres watched as the flames spread and the father ran outside and then back inside in an unsuccessful attempt to save his family. Torres' actions were neither impulsive nor driven by peer pressure.

Delaware prosecutors considered various charges against Torres. They knew that a conviction of first-degree murder would result in a mandatory sentence of life without parole (because Delaware has no parole). They considered Torres' age and the mandatory nature of the penalty among the many factors that informed their charging decision. They ultimately decided to charge him with first degree murder, concluding that his age did not reflect the gravity of his crime, including his careful planning, the fact that he acted alone and without provocation, and that he bragged to friends about the crime. Prosecutors also relied on a psychological evaluation finding that Torres lived in a stable home, suffered from no mental disorders, and had no history of physical or sexual abuse.

A jury convicted Torres of four counts of intentional murder and four counts of felony murder. Under Delaware law, he was sentenced to eight consecutive life sentences.

Ashley Jones.[4] Sisters Ashley Jones, age 14, and Mary Jones, age 10, lived with their grandparents,

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[4] Telephone interview with Laura Poston, Assistant District Attorney, Jefferson County, Ala. (Jan. 31, 2012); telephone interview with Michael Anderton, Assistant District Attorney, Jefferson County, Ala. (Feb. 8, 2012); *see also Alabama v. Jones*, No. CC-2000-0151 (Cir. Ct. of Jefferson Cty., Ala., May 25, 2001) (unpublished).

Deroy and Mary Elizabeth Nalls. After the grandparents prohibited Ashley from seeing her boyfriend, she hatched a plan to murder them. While the family was asleep, Ashley and her boyfriend—at Ashley's direction—shot, stabbed, and burned the grandparents, an aunt who was staying in the home, and Ashley's sister Mary, whom Ashley herself insisted on stabbing. Ashley's grandmother and sister survived; her grandfather and aunt did not. When police later revealed that Mary had survived, Ashley responded, "I thought I killed that bitch."

Alabama prosecutors considered various charges they might bring against Ashley. Under Alabama law, various statutory guidelines, including "[t]he extent and nature of the physical and mental maturity of the child," Ala. Code § 12-15-203(d)(5), guide the decision to try a juvenile as an adult. Prosecutors decided to prosecute Ashley for capital murder and attempted murder after concluding that her age did not reflect the gravity of her crime, including her careful advance planning, control over an accomplice, and emotionless response. In making the charging decision, prosecutors also considered the fact that Ashley was not escaping an abusive home, and a psychological evaluation showing that she suffered from no formal disorders. A judge agreed with prosecutors that Ashley belonged in adult court facing an adult sentence.

A jury convicted Ashley of two counts of capital murder and two counts of attempted murder. She is currently serving life without parole.

These cases underscore that the categorical approach proposed by petitioners is unsound and

unwarranted.[5] Under current law, any particular 14-year-old may challenge a sentence of life without parole as grossly disproportionate under the Eighth Amendment. The categorical approach advocated by petitioners thus does nothing more than provide a windfall to the most egregious juvenile offenders, like Donald Torres and Ashley Jones, who could not possibly establish that their sentences are grossly disproportionate to their crimes under all the facts and circumstances.

B. The Categorical Rule Proposed By Petitioners Would Transform The Eighth Amendment Into A National Code Of Juvenile Justice.

Under our federal system, "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). To accept petitioners' arguments in this case would be to transform the Eighth Amendment into nothing less than a National Code of Juvenile Justice.

The logic of petitioners' arguments sweeps far beyond the validity of sentences of life without parole for 14-year-olds convicted of homicide. Indeed, that logic calls into question *every* criminal sentence meted out to a juvenile. For one thing, there is little functional difference between a lengthy term of years

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[5] For other accounts of juveniles sentenced to life without parole for their crimes, *see* Charles D. Stimson & Andrew M. Grossman, *Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens* (2009) *available at* http://www.heritage.org/research/reports/2009/08/adult-time-for-adult-crimes-life-without-parole-for-juvenile-killers-and-violent-teens (last visited Feb. 21, 2012).

and life in prison. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 79 (2003) (Souter, J., dissenting) ("[B]ecause [the defendant] was 37 years old when sentenced, the substantial 50-year period amounts to life without parole," and it would be "unrealistic" to "reject the practical equivalence of a life sentence without parole and one with parole eligibility at 87" because "an 87-year-old man released after 50 years behind bars will have no real life left, if he survives to be released at all."). Nor are such functional-equivalence arguments necessarily limited to lengthy terms of years; rather, they may also apply to shorter terms of years imposed consecutively. *See, e.g.*, *Postelle v. Florida*, 383 So. 2d 1159, 1163 (Fla. Dist. Ct. App. 1980) (affirming consecutive terms amounting to 114 years in prison for juvenile convicted of homicide).

These are not idle hypotheticals. In the wake of *Graham*, the lower courts are already fielding such challenges. *See, e.g.*, *Angel v. Virginia*, 704 S.E.2d 386, 402 (Va. 2011) (addressing argument that non-homicide sentence violated *Graham* because the State does not allow parole until age 60 or 65); *Arizona v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011) (addressing argument that consecutive sentences totaling 139.75 years contravenes *Graham*); *Thomas v. Florida*, No. 1D10-1613, __ So. 3d __, 2011 WL 6847814 (Fla. Dist. Ct. App. Dec. 30, 2011) (addressing argument that 50-year sentence is the functional equivalent of life without parole).

Moreover, petitioners' position necessarily leads to the question of when, ostensibly as a matter of federal constitutional law, an opportunity for parole must be offered to a juvenile sentenced to life. That question is particularly vexing with respect to those

States, like Delaware, that do not have parole at all. Petitioners seem to hint at an answer to this question when they request that Jackson be given access to the Arkansas parole system on the same terms as persons who did *not* commit a capital crime, allowing him a chance of release after 15 years of incarceration. Pet'r Br. 57-58.

Finally, the logic of petitioners' argument extends well beyond 14-year-olds—a fact that petitioners themselves make no effort to conceal. Thus, petitioners candidly ask this Court to declare that the sentence of life without parole is categorically unconstitutional for persons who commit homicide before "the age of 18." Pet'r Br. 61. In truth, the logic of petitioners' position goes much further still. The premise of their argument is the empirical assertion that juveniles cannot be held fully accountable for their actions because the frontal lobes of their brains are not yet fully developed. *See* Pet'r Br. 20, 40-41. But the very research on which petitioners rely asserts that the frontal lobe of the human brain is not fully developed until the mid-20s. See, *e.g.*, Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci. 77 (2004) (noting that human brains undergo significant development past age 20), (cited at Pet'r Br. 20, 21, 65); Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 Quinnipiac Health L. J. 1, 5 (2005) (arguing "that 'juvenile' should apply to those over eighteen and up to the age of twenty-two, which research suggests is the biological age of maturity.") (cited at Pet'r Br. 21, 65); *see also Amicus* Br. of American Psychological Association, *et al.* (APA Br.) 13 ("[S]kills required for future planning continue to

develop until the early 20s."); *id.* at 28 (noting that myelination in the brain continues into "early adulthood") (internal quotation omitted). If differences between mature and immature brains warrant the conclusion that life without parole may never be imposed on a 14-year-old, there is no reason why those differences would not warrant the same conclusion for defendants well into their twenties.

The upshot of this approach is a federal constitutional regime based not on law but on ever-evolving social and natural science. *See, e.g.*, The Royal Society, *Brain Waves Module 4: Neuroscience & the Law* 1-2 (Dec. 2011) ("At present there may be relatively little neuroscience that can be directly applied to the law, but this will surely change over the next ten to twenty years."); APA Br. 4 ("research suggests a *possible* physiological basis" for certain brain differences between juveniles and adults) (emphasis added). Penological lines based on such emerging science are the sort of lines that, in a democratic society, should be drawn by elected state legislators, not unelected federal judges.

At bottom, nothing in the text or history of the Eighth Amendment or this Court's precedents supports the one-size-fits-all categorical rule of constitutional law that petitioners are proposing here. To the contrary, that rule would represent a marked extension of this Court's decisions in *Roper* and *Graham*. If nothing else, this Court should heed Justice Jackson's sage advice: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added." *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (opinion concurring in the result). This Court should refuse to

add the additional story now requested by petitioners, lest the entire temple collapse of its own weight.

CONCLUSION

For the foregoing reasons, as well as those set forth in respondents' briefs, the judgments in both cases should be affirmed.

Respectfully submitted,

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February 21, 2012

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Nos. 10-9646, 10-9647

Supreme Court, U.S.
FILED
FEB 21 2012
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

EVAN MILLER,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

ON WRITS OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS AND THE SUPREME COURT OF ARKANSAS

BRIEF OF *AMICUS CURIAE* THE NATIONAL ORGANIZATION OF VICTIMS OF JUVENILE LIFERS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION	4
ARGUMENT	7
I. LIFE IMPRISONMENT WITHOUT PAROLE IS AN APPROPRIATE SENTENCE FOR JUVENILES WHO COMMIT THE MOST HEINOUS MURDERS	7
II. A CATEGORICAL BAN ON THE LIFE-WITHOUT-PAROLE SENTENCE FOR JUVENILE KILLERS WILL NEEDLESSLY TRAMPLE ON THE RIGHTS OF VICTIMS	21
CONCLUSION	25

TABLE OF CITED AUTHORITIES

Page

CASES

Angelo v. People,
96 Ill. 209, 1880 WL 10095 (1880) 8

Com. v. Ogden O.,
864 N.E.2d 13 (Mass. 2007) 8

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75 P. 693 (Or. 1904) 7

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130 S. Ct. 2011 (2009) ..... *passim*

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428 U.S. 153 (1976) 9

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657 F.3d 258 (5th Cir. 2011) 22

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Page

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No. CC-2000-0151 (Ala. Cir. Ct. May 25, 2001).. 16

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579 N.W.2d 613 (S.D. 1998)..... 13

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797 N.W.2d 451 (Wis. 2011) 4, 16, 18

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	Page
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	Page
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	Page
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Page

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Page

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INTEREST OF AMICUS CURIAE[1]

The National Organization of Victims of Juvenile Lifers ("NOVJL") is a national victims' rights organization comprised of the families of victims murdered by juvenile offenders who were tried and sentenced as adults because of the horrific nature of their extremely violent crimes. NOVJL works to find other victims of violent juvenile offenders tried and sentenced to life imprisonment in order to ensure that their voices are part of the national discussion concerning the imposition of life sentences on juveniles and to support each other as victims of the devastating acts of criminally violent teens. NOVJL works to protect and preserve victims' rights through public policy advocacy at both the federal and state levels and by filing amicus briefs in cases that bear on victims' rights. *See Graham v. Florida*, 130 S. Ct. 2011 (2009).

At the time of our nation's founding, crime victims were actively involved in the administration of justice. Indeed, early American criminal prosecutions generally were brought by the victim. *See* D. Beloof & P. Cassell, *The Crime Victim's Right to Attend the Trial: the Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481, 484-85 (2005). But as the criminal justice system transformed to a public-prosecution model, victims' rights

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* NOVJL certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), the parties' letters so consenting have been filed with the Clerk.

often were overlooked. A task force commissioned by President Reagan to assess the treatment of crime victims in the criminal justice system found that these victims "have been overlooked, their pleas for justice have gone unheeded, and their wounds—personal, emotional and financial—have gone unattended." President's Task Force on Victims of Crime, Final Report, Washington, D.C.: U.S. Government Printing Office, Dec. 1982.

Victims' rights groups, buoyed by the work of the Task Force, succeeded in restoring many of the rights of victims in the criminal justice system. Now, every State in the Union either has enacted legislation or amended its constitution (or in some cases both) to expressly guarantee victims' rights.[2]

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2. ALA. CODE § 15-23-79; ALASKA CONST. art. I, § 24; ALASKA STAT. § 33.16.120; ARIZ. CONST. art. II, § 2.1; ARIZ. REV. STAT. ANN. § 13-4414; ARK. CODE ANN. §§ 16-90-1109, -1113; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16A; COLO. REV. STAT. ANN. §§ 24-4.1-302(2), -302.5; CONN. GEN. STAT. ANN. § 54-203; DEL. CODE ANN. TIT. 11, § 9416; FLA. CONST. art. I, § 16; FLA. STAT. ANN. § 960.001; GA. CODE ANN. §§ 17-17-13; HAW. REV. STAT. §§ 706-670, -670.5; IDAHO CODE ANN. § 19-5306; 725 ILL. COMP. STAT. ANN. 120/4.5; 730 ILL. COMP. STAT. ANN. 5/3-3-4; IND. CODE ANN. § 35-40-5-5; IOWA CODE ANN. § 915.18; KAN. STAT. ANN. § 22-3717; KY. REV. STAT. ANN. §§ 421.500, 421.520; LA. REV. STAT. ANN. § 46:1844; ME. REV. STAT. ANN. TIT. 17-A, § 1175; MD. CODE ANN., CORR. SERV. § 7-801; MASS. GEN. LAWS ANN. CH. 258B, § 3; MICH. COMP. LAWS ANN. § 780.769; MINN. STAT. ANN. § 243.05; MISS. CODE ANN. § 99-43-43; MO. ANN. STAT. § 595.209; MONT. CODE ANN. § 46-24-212; NEB. REV. STAT. § 81-1848; 2011 NEV. LAWS CH. 23 (A.B. 18); N.H. REV. STAT. ANN. § 21-M:8-K; N.J. STAT. ANN. § 52:4B-44; N.M. STAT. ANN. § 31-21-25; N.Y. CRIM. PROC. LAW § 440.50; N.C. CONST. art. I, §37; N.C. GEN. STAT. ANN. § 15A-1371; N.D. CENT. CODE § 12.1-34-02; OHIO REV. CODE ANN. § 5149.101; OKLA. STAT. TIT. 57 § 332.2; OR. REV. STAT. ANN. § 144.098; 61 PA. CONS. STAT. ANN. § 6140; R.I. GEN. LAWS §

Congress also has enacted multiple statutes to protect the rights of crime victims, including the Victim and Witness Protection Act of 1982, the Victim's Rights and Restitution Act of 1990, and the Crime Victims' Rights Act of 2004, which among other things ensures "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding." 18 U.S.C. § 3771(a)(4).

Thus, both the States and Congress have recognized the importance of preserving the role of victims and victims' families[3] throughout the criminal process, from trial to sentencing and to parole proceedings for those

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12-28-6; S.C. CONST. art. I, § 24; S.C. CODE ANN. § 16-3-1560; S.D. CODIFIED LAWS § 24-15A-43; TENN. CODE ANN. § 40-38-103; TEX. CODE CRIM. PROC. ANN. art. 56.02; UTAH CODE ANN. § 77-27-9.5; VT. STAT. ANN. TIT. 13, § 5305; VA. CODE ANN. § 53.1-155; WASH. REV. CODE ANN. § 7.69.032; W. VA. CODE ANN. § 62-12-23; WIS. STAT. ANN. §§ 304.06, 950.04; WYO. STAT. ANN. §§ 1-40-204, 7-13-402; D.C. CODE §§ 23-1901, 23-1904.

3. There is a national consensus that the rights afforded to crime victims extend to the family members of murder victims. *See, e.g.*, 18 U.S.C. § 3771(e) ("For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter."); Ala. Code § 15-23-60(19) (defining "victim" as a "person against whom the criminal offense has been committed, or if the person is killed or incapacitated, the spouse, sibling, parent, child, or guardian of the person"). For this reason, the term "victim" is sometimes used in the literature on victims' rights as including the family members of a murder victim.

violent offenders that become eligible for release. After all, it is the families of the victims of juvenile murderers, and organizations such as NOVJL, that must always remind those charged with the administration of justice of the heinous acts that led these teenagers to be charged and sentenced as adults. *See* Pub. L. 97-291, § 2(a)(1) ("Without the cooperation of victims ... , the criminal justice system would cease to function.").

INTRODUCTION

Petitioners rely on psychological and scientific research to argue that "numerous features of adolescence" make teens who commit crimes "less culpable than adults." Jackson Br. at 5. Even assuming this is true as a general matter, it has little bearing on any individual comparison. *See* The Royal Society, *Brain Waves Module 4: Neuroscience and the law*, at 13 (Dec. 2011) (Given that "[t]here is huge individual variability in the timing and patterning of brain development ... decisions about responsibility should be made on an individual basis at this stage of development."). As one court recently remarked, "[e]ven assuming that such psychological and scientific research is constitutionally relevant, the generalizations concluded therein are insufficient to support a determination that 14-year-olds who commit homicide are never culpable enough to deserve life imprisonment without parole." *State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011) (affirming life-without-parole sentence imposed upon fourteen-year-old murderer).

Looking at the facts and circumstances of "[s]pecific cases," *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010),[4] it is quite clear that, despite their age, certain teen-aged murderers are more than capable of distinguishing right from wrong and fully appreciating the consequences of their actions. Indeed, this observation is reflected in the common-law maxim *malitia supplet ætatem*: malice supplies the want of years. As illustrated below, some teen-aged murderers exhibit sufficient malice to hold them accountable as adults for their murderous acts. Thus, a prophylactic constitutional rule prohibiting the imposition of a life-without-parole sentence on *any person* under 18 years of age would be unwarranted and improper. Whether such a sentence is justified should be assessed on a case-by-case basis. *See generally Graham*, 130 S. Ct. at 2036-42 (Roberts, C.J., concurring in the judgment).

Moreover, engrafting such a rule onto the Eighth Amendment would substantially harm victims' families. When juvenile murderers are sentenced to life, victims' families are able to achieve some measure of finality, at least with respect to the legal process. But if that sentence were made categorically unavailable, even for the worst offenders, these families would be forced to relive the facts of the murder over and over as they prepare for and participate in parole hearings. For them, that process

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4. *See also* Craig Lerner, *Juvenile Criminal Responsibility: Can Malice Supply The Want Of Years?*, 86 TULANE L. REV. 309, 339-40 (2012) ("Recounting the facts of a crime where a claim of juvenile immaturity is raised is essential in clarifying the kind of juvenile being discussed. ... [It] can dispel the idea that [the teen-aged murderers] are typical adolescents; it should alert one to the possibility that [teen-aged] murderers ... are atypical. So alerted, one might be inoculated from facile claims that defendants in such cases are just adolescents behaving badly.").

would never end, harming their mental and physical health as a result. Replacing the finality of the life-without-parole sentence with the recurring anguish of the parole process effectively imposes a sentence on victims' families—a sentence under which they must forever relive the crime that took their loved one's life and live in constant fear of a killer being turned loose.

A categorical ban on the imposition of the life-without-parole sentence on teen-aged killers would cause particular harm to the victims' families in cases in which the juvenile lifer's conviction and sentence are final. Because these families rightfully thought they had reached the end of the legal process, they would have had no reason to preserve court records or other relevant information that might bear on a parole decision. Without such information, they would be unable to mount an effective opposition to parole. Such a circumstance would render illusory the participatory rights conferred upon them and protected by the laws of all fifty states and the federal government. *See supra* note 2 & p. 3.

In sum, because the life-without-parole sentence may be constitutionally imposed on teen-aged killers under certain circumstances, categorically banning it under the Eighth Amendment would be improper. This is especially so because such a categorical approach would cause great harm to victims' families and undermine their right to participate in the criminal justice process.

ARGUMENT

I. LIFE IMPRISONMENT WITHOUT PAROLE IS AN APPROPRIATE SENTENCE FOR JUVENILES WHO COMMIT THE MOST HEINOUS MURDERS.

"[T]he capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment." William Blackstone, 4 *Commentaries* 23. At common law, a fourteen-year-old was considered to have the same criminal capacity as an adult. Notwithstanding his age, the fourteen-year old was "*doli capax*" or "fully accountable for his criminal conduct." *Whitehead v. State*, 262 A.2d 316, 318 n.1 (Md. App. 1970) (citing Clark & Marshall, *Law of Crimes*, 6th Ed., § 6.12, pp. 391-394); *see also* Black's Law Dictionary 521 (8th ed. 2004) (defining "*doli capax*" as "[c]apable of committing a crime or tort; esp., old enough to determine right from wrong"). On the other hand, a child of seven years or less was considered *doli incapax*. *See, e.g., Dubiver v. City & S. Ry. Co.*, 75 P. 693, 694 (Or. 1904).

Those between ages seven and fourteen were presumed to be *doli incapax*, but that presumption could be overcome if the crime committed exhibited sufficient malice:

> Between the ages of seven and fourteen years an infant is deemed prima facie to be *doli incapax*; but in this case the maxim applies, *malitia supplet ætatem*—malice (which is here used in its legal sense, and means the doing of a wrongful act intentionally, without just cause or excuse,) supplies the want of mature years.

Angelo v. People, 96 Ill. 209, 1880 WL 10095, at *2 (1880) (quoting *Broom's Legal Maxims* 232-33). "The period between seven and fourteen is subject to much uncertainty: for the infant shall, generally speaking, be judged prima facie innocent; yet if he was *doli capax*, and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion." 1 W. Blackstone, *Commentaries* 452-53 (1765) (quoted in *Com. v. Ogden O.*, 864 N.E.2d 13, 17 n.3 (Mass. 2007)).

Although the precise age at which the criminal justice system deems people *doli capax* may vary somewhat from jurisdiction to jurisdiction, *see, e.g.*, Alabama Br. at 5,[5] the maxim still holds—*malitia supplet ætatem*. And teen-aged murderers who commit crimes with sufficient malice may properly be deemed "fully accountable" for their conduct.[6]

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5. *See also* The Royal Society, *Brain Waves Module 4: Neuroscience and the law*, at 13 (Dec. 2011) ("In England the age of criminal responsibility is ten. This means that up to the age of ten a child will not be held responsible for criminal acts. From the age of ten however, in the eyes of the law, a child is accountable in the same way as an adult for their behaviour, and is deemed sufficiently mature to stand trial and to engage in legal processes.").

6. It thus is constitutionally irrelevant whether psychological and scientific research suggests that teens as a class are less responsible for their criminal conduct than adults. Jackson Br. at 5. In any event, the research on this point is inconclusive at best. *See* Stephen J. Morse, *Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note*, 3 Ohio St. J. Crim. L. 397, 409 (2006) ("The neuroscience evidence in no way independently confirms that adolescents are less responsible."); *see also* Alabama

The following examples illustrate the point. As they show, the life-without-parole sentence may be properly imposed on teen-aged murderers where malice supplies the want of years,[7] especially given that the Court not so long ago upheld a life-without-parole sentence imposed on a first-time offender who committed a nonviolent drug-possession crime, *see Harmelin v. Michigan*, 501 U.S. 957, 1002-04 (1991).[8]

Br. at 43-48. Moreover, some of the scholarly literature on the issue actually suggests that it is not that the underdeveloped brain causes risky behavior but that risky behavior may cause changes to the brain. *See, e.g.*, Robert Epstein, *The Myth of the Teen Brain*, SCIENTIFIC AM. MIND, April/May 2007, at 58 ("There is clear evidence that any unique features that may exist in the brains of teens—to the limited extent that such features exist—are the result of social influences rather than the cause of teen turmoil.").

7. The relative rarity with which the life-without-parole sentence is imposed on teen-aged murderers demonstrates only that legislatures and prosecutors properly reserve this sentence for particularly depraved murderers. Especially given that most States provide for the possibility of life without parole for at least some teen-aged murderers, *see* Alabama Br. at 9 ("Thirty-nine jurisdictions have statutes allowing 14-year-olds to be sentenced to life without parole for aggravated murder."), the infrequency with which this sentence is opposed cannot possibly support a finding that there is any sort of national consensus against it.

8. A murderer is surely much more criminally culpable than a non-violent, first-time drug offender, principally because murder, like the death penalty, is "'unique in its severity and irrevocability.'" *Graham*, 130 S. Ct. at 2027 (quoting *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *see id.* ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.").

1. **Donald Torres (age 14)**

Victims: **Harry Godt (adult)**
Jennifer Godt (adult)
Jon Godt (age 4)
Jennifer Godt (age 1½)

At approximately midnight on February 24, 1989, Donald Torres broke into the home of his neighbor Harry Godt, knowing that Mr. Godt, his wife, and two young children were asleep on the second floor. Torres spread kerosene over the kitchen floor and the stairway to the second floor of the home. Using his lighter and some newspaper, Torres ignited the kerosene. From outside his apartment, Torres watched the flames spread through and engulf the Godts' home. He watched Mr. Godt run out of the house and then go back inside to attempt to save his family. Harry Godt, his wife, and their two young children all perished in the fire.

According to the State Medical Examiner, the Godts all died of asphyxia due to carbon monoxide saturation of the hemoglobin and third-degree burns that covered 90 to 95 percent of their bodies.[9] After initially denying any involvement, Torres later admitted to police that "he had intentionally started the fire to get back at Harry Godt because Godt had accused Torres of teaching [Godt's] son, Jon, to play with matches." Torres also admitted that he

9. *See Torres v. State of Delaware*, 608 A.2d 731 (Del. 1992); *Torres v. State of Delaware*, 642 A.2d 837 (Del. 1994); *Torres v. Kearney*, No. 04-109, 2005 WL 3263098 (D. Del. Dec. 1, 2005).

had known that "the Godt family was in the home when he started the fire."[10]

A Delaware jury convicted Torres of four counts of intentional first degree murder and four counts of reckless first degree felony murder. He was sentenced to eight consecutive terms of life without parole.[11]

2. **Paul Dean Jensen Jr. (age 14)**

Victim: Michael Hare (adult)

Paul Jensen already had a record of shoplifting, vandalism, burglary, arson, stalking, and more when he committed premeditated murder.

On January 14, 1996, Jensen engaged in a "dry run" of his plan to rob a taxicab. At about midnight, a Pierre, South Dakota taxicab dispatcher received a call requesting a ride from Buhl's Laundry. When the taxi driver arrived, she was met by Jensen and his sixteen-year-old friend, Shawn Springer. At their request, the taxi driver took Jensen and Springer on a two-stop journey that ended only one block from where they met the cab in the first place. During the drive, Springer asked the taxi driver if anyone had ever stolen or tried to steal the cab money bag. The driver responded that if anyone did try to steal it, they could have it, as it only contained thirty dollars.

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10. *See* CHARLES D. STIMSON & ANDREW M. GROSSMAN, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 46 (Heritage Found. Aug. 2009).

11. *Torres*, 608 A.2d 731; *Torres*, 642 A.2d 837; *Torres*, 2005 WL 3263098.

Seven days later, Jensen, his sister, and Springer entered a friend's unlocked apartment and stole some cash, a necklace, a shotgun, and a handgun that turned out to be the weapon used to kill a taxi driver five days later. On the evening of January 26, 1996, Jensen showed the stolen handgun to a friend. He also showed the friend two or three ammunition clips. At around 11:00 pm, the Pierre taxi dispatcher received a call from Springer requesting to be picked up at the Days Inn and insisting to be picked up at "north back door." The dispatcher refused, stating that the cab would arrive at the office door. Springer indicated that there would be two passengers. When the dispatcher asked where they were going, Springer said, "Paul, where are we going?" Jensen replied, "I don't know. Fort Pierre, I guess. I don't know."

The taxi driver, Michael Hare, arrived at the Days Inn and shortly thereafter noticed Jensen and Springer coming from the back of the Days Inn. They entered the cab and directed Hare to take them to Fort Pierre. Jensen and Springer directed Hare to take them down a gravel road near Fort Pierre where the cab stopped. At this very same time, the dispatcher was trying to call Hare's cellular phone. Although Hare did not directly respond to her call, the dispatcher could hear Hare say over the cell phone: "That's all I have is thirty bucks. Take it. Take it all." The dispatcher then heard Jensen and Springer say, "That ain't all you got" and demand "everything." Hare replied, "That's all I have. They only give us thirty bucks. You can have it. Take it, take it all."

Jensen got out of the taxi with the stolen handgun drawn. He ordered Hare to exit the vehicle. After Hare got out of the vehicle, Jensen shot him in the chest. Hare

fell down and pleaded for his life, yelling, "Please God, don't kill me." Jensen approached Hare and shot him once more on each side of the head, killing him. Jensen then grabbed Hare's billfold and other items, which had been placed on the hood of the taxi, and jumped into the passenger seat. Springer and Jensen drove off, leaving Hare's lifeless body at the end of the gravel road. They were apprehended shortly thereafter by police, who had been alerted to the crime by the dispatcher.

Later, while Jensen was being held in the Juvenile Corrections Center in Rapid City, he bragged to the other juveniles in his holding area about having planned and executed the murder of a taxi driver. According to the testimony of one of the juveniles, "Jensen related the story of his cold-blooded execution-style murder in a calm and unfeeling manner."[12] A South Dakota jury convicted Jensen of first-degree murder. He was sentenced to life imprisonment without parole.[13]

3. Ashley Jones (age 14)

Victims: **Deroy Nalls (adult)**
Mary Nalls (adult)
Millie Nalls (adult)
Mary Jones (age 10)

In 1999, Ashley Jones and her sixteen-year-old boyfriend, Geramie Hart, plotted and executed a horrific crime that involved the murder of her grandfather and

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12. *State of South Dakota v. Jensen*, 579 N.W.2d 613 (S.D. 1998).

13. *Id.*

her Aunt Millie and would have involved the murder of her grandmother and her 10-year-old sister had they not miraculously survived the attack.

Hart and her ten-year-old sister Mary lived with their grandparents, Deroy and Mary Nalls. Jones's aunt, Millie Nalls, also lived in the house. Jones's family did not approve of her relationship with Hart, so she plotted with Hart to kill them, set the house ablaze, and abscond with their money.

On the night of August 29, 1999, Deroy Nalls was in the den watching television. His wife, daughter, and younger granddaughter were asleep in their rooms. Jones let Hart into the house. He was armed with Deroy's .38 caliber pistol, which Jones previously had smuggled to him. Jones and Hart entered the den, where Hart promptly shot Deroy twice in the face. Jones and Hart then moved quickly to Millie's bedroom where she had been sleeping and shot her three times. Seeing that she survived the gunshots, Jones and Hart hit her repeatedly with portable heaters, stabbed her in the chest, and set her room on fire. The pair next entered Mary Nalls's bedroom and shot her once in the shoulder, stopping only because it was their last bullet.

Jones and Hart returned to the kitchen area and discovered that Deroy was still alive. Hart hit him with various objects and stabbed him repeatedly, leaving the knife in his back. Jones then poured charcoal lighter fluid on her grandfather and set him on fire. Jones's young sister, Mary, woke up, and Jones led her into the kitchen area where she saw her grandfather on fire but still alive. Hart forced Deroy to disclose where he kept his money, and then stabbed Deroy in the throat. Jones then poured

lighter fluid on her grandmother and set her on fire. Jones and Hart watched her burn, and Hart urged Jones to pour more lighter fluid on her. Young Mary attempted to flee the kitchen, but Jones grabbed her and began hitting her. Hart pointed the gun at the young girl and said, "This is how you are going to die." Jones said, "No, let me do it," and stabbed her little sister 14 times. Jones and Hart then set the house ablaze.

Jones and Hart took $300 that had been hidden beneath her grandparents' mattress and drove away in their Cadillac. Miraculously, Mary Jones survived, despite suffering a collapsed lung and multiple stab wounds. The ten-year-old had pretended to be dead until Jones and Hart fled the burning house and then heroically helped her grandmother out of the house and contacted others for help.

Jones and Hart were arrested the next morning in a hotel room, where her grandparents' car had been found in the parking lot. Jones and Hart voluntarily confessed to the murders of Jones's grandfather and aunt and the attempted murders of her grandmother and little sister.[14] Upon learning that her younger sister had survived the attack, Jones remarked "I thought I killed that bitch."[15]

Jones was convicted of two counts of capital murder and two counts of attempted murder. She was sentenced to life imprisonment without parole. The sentencing judge noted that Jones "did not express genuine remorse for her actions." The judge also noted that "while awaiting her

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14. *See Hart v. State of Alabama*, 852 So.2d 839 (Ala. Crim. App. 2002).

15. *See* C. Stimson & A. Grossman, *supra*, at 27.

sentencing, the defendant had threatened older female inmates in the Jefferson County Jail by telling them she would do the same thing to them that she had done to her family."[16]

4. Omer Ninham (age 14)

Victim: Zong Vang (age 13)

Omer Ninham committed a murder that the Supreme Court of Wisconsin described as "a horrific and senseless crime [that] cannot adequately be reduced into words. The terror experienced by the victim and the hurt suffered by his family and friends is, in a word, unimaginable."[17]

On the evening of September 24, 1998, Zong Vang was riding his bike home with a bag of tomatoes his older brother had asked him to pick up from the grocery store. While riding along Webster Avenue in Green Bay, Wisconsin, Vang was approached by five teens: Ninham, 13-year-old Richard Crapeau, 13-year-old Jeffrey P., 14-year-old Amanda G., and 14-year-old Christin J.

Vang did not know any of them and had done nothing to provoke them. He just happened to encounter a group looking for a fight. Crapeau said to Ninham, "Let's mess with this kid," and Ninham responded, "'I got your back,' meaning he would back [Crapeau] up in a fight."[18]

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16. *State of Alabama v. Jones*, No. CC-2000-0151, 0152 (Ala. Cir. Ct. May 25, 2001) (finding of fact from guilt phase of trial).

17. *See State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011).

18. *See id.*

Ninham and Crapeau began taunting Vang and quickly attacked him. Crapeau then yanked Vang's bicycle away from him, grabbed Vang's grocery bag, and threw it in the street. After Vang asked them for his bicycle back, Ninham punched Vang, knocking him to the ground.

Vang got up and attempted to flee, running towards a parking ramp at St. Vincent's Hospital, which was on the same street. The attackers chased Vang, catching up to him at the top of the five-story parking ramp. When they reached Vang, Crapeau punched him in the face. Vang repeatedly begged for mercy and asked why they were trying to hurt him. But Ninham and Crapeau continued to attack Vang.

Ninham then pinned Vang against a concrete wall, and Crapeau punched Vang in the face. As Vang cried and screamed, "Let me go," Ninham and Crapeau lifted Vang up off the ground, with Ninham holding Vang's wrists and Crapeau holding Vang's ankles. Ninham and Crapeau "then began swinging Vang back and forth out over the parking ramp's concrete wall—a drop that measured nearly 45 feet to the ground." Vang, still crying and screaming, pleaded with Ninham and Crapeau not to drop him. Crapeau then let go of Vang's feet and urged Ninham to "[d]rop him." Showing no mercy to the still-pleading Vang, Ninham let go of Vang, leaving him to plunge five stories to his death. At just that time, a bystander exiting the parking facility down at ground level heard what sounded like a "bag of wet cement hitting the pavement." Vang landed on his back on the parking ramp's paved exit lane, 12 feet from the base of the ramp.

Ninham, Crapeau, and their companions fled the scene, leaving Vang in a heap on the concrete. One of the

other companions later testified that Ninham stood for several seconds looking over the edge of the wall at Vang on the ground below. Ninham then looked at Jeffrey P. and said, "Don't say nothing. Better not say shit." Rescue personnel were unable to revive Vang. The official cause of Vang's death was craniocerebral trauma resulting from his fall.

A jury convicted Ninham of first-degree intentional homicide and of physical abuse of a child for the death of the thirteen-year-old Vang. Ninham was sentenced to life imprisonment without parole.[19]

5. **Scott Darnell (age 15)**

Victim: Vicki Larson (age 10)

Scott Darnell already had a record that included molesting young girls, attempted rape, and assault with a deadly weapon when he raped and murdered Vicki Larson.[20] Indeed, it was only a month earlier that Darnell had been released from incarceration and placed in the custody of a parole officer.[21] He was on an authorized absence from a correctional facility at the time he raped and murdered Vicki.[22]

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19. *State of Wisconsin v. Ninham*, 797 N.W.2d 451, 457 (Wis. 2011).

20. Kris Jensen & Daniel J. Foley, *Who Failed with Scott Darnell?*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 12, 1979).

21. *Larson v. Darnell*, 448 N.E.2d 249, 250 (Ill. App. 1983).

22. Kris Jensen & Daniel J. Foley, *Who Failed with Scott Darnell?*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 12, 1979).

On July 12, 1979, Darnell lured Vicki away from her brother's baseball game to a location in a nearby cornfield where he had already dug a shallow grave three days earlier. There, Darnell raped and strangled Vicki to death with a bandana. He then dumped her lifeless body into the pre-dug grave and buried her. In an attempt to conceal his crimes, he buried the bandana he had used to strangle Vicki. In addition, he threw his wristwatch into a nearby field in order to set up an alibi that he had been jumped and had his watch stolen.

Darnell and Vicki were the objects of an overnight search after they had been reported missing that evening. Local police came across Darnell the next morning, finding him "extremely dirty, wet and muddy." He told them that he had been jumped by two men on motorcycles who stole his watch.

Later on, Darnell confessed to the rape and murder-by-strangulation of Vicki Larson. He showed officers where he had buried his bandana and where he had thrown his watch. He also showed them the shovel that he had used to dig what would be Vicki's grave.[23]

Darnell was convicted of murder and rape at a bench trial. Darnell showed little emotion during the trial and verdict, but "joked freely with jailers and relatives during the recesses."[24] Darnell was sentenced to life imprisonment without parole. The sentencing judge

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23. Craig Brown, *Witnesses describe Darnell, scene of murder*, QUAD-CITY TIMES (Davenport, Iowa) (Jan. 29, 1980).

24. Craig Brown, *Judge finds Darnell guilty of rape, murder*, QUAD-CITY TIMES (Davenport, Iowa) (Feb. 8, 1980).

remarked that Darnell's rape and murder of Vicki Larson were "exceptionally brutal."[25]

A few years later, while Darnell was in prison for the rape and murder of Vicki Larson, prison officials uncovered and thwarted an elaborate escape plan that Darnell was in the process of carrying out. In uncovering the escape, the prison officials found a letter from Darnell addressed to Judge Jeffrey O'Connor, who had been the state's attorney who prosecuted Darnell. The letter read:

> You used me, you took my life as surely as if you would of sent me to the chair.
>
> Do you wonder why I write in red? It is the color of your blood. Do you have daughters, Jeffrey? If they are young, I'll be merciful with them. As merciful as I was with Viki. But regardless, they shall die.
>
> Wether wife sons daughter or any other, they shall die in front of your eyes.
>
> And when every cry is called, every tear shed, every drop of blood spilled before your feet, it will be your turn.... I will keep you alive for days. But you will die finally. And I'll feed you to the dogs.[26]

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25. Craig Brown, *Murderer's chilling letter never sent*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 2, 1984).

26. Craig Brown, *Murderer's chilling letter never sent*, QUAD-CITY TIMES (Davenport, Iowa) (Aug. 2, 1984).

II. A CATEGORICAL BAN ON THE LIFE-WITHOUT-PAROLE SENTENCE FOR JUVENILE KILLERS WILL NEEDLESSLY TRAMPLE ON THE RIGHTS OF VICTIMS.

The Court has remarked that the life-without-parole sentence is somewhat unique. *See Graham*, 130 S. Ct. at 2027. The way in which it is perhaps most unique is that it is the *only* sentence that allows victims to obtain legal finality. The life-without-parole sentence brings them certainty by terminating the legal process. *See Menzies v. Galetka*, 150 P.3d 480, 521 (Utah 2006) (Wilkins, J., concurring) ("[A] sentence of life without parole" is "more certain for the victims."). It avoids the interminable nature of the death penalty appeal process. *See id.* (describing the "seemingly endless requirements to review, re-review, analyze, and re-analyze any possible defect in the proceedings by which those found guilty of crimes so hideous that the death penalty is imposed"). And it enables victims to avoid the recurring pain of the parole process, which forces them to relive the horrors of these heinous crimes and paralyzes them with fear that the murderers who so callously took the lives of their family members might be released.

Imposing the parole process on victims' families thus comes at a substantial cost. Each parole proceeding inflicts on them the mental and physical anguish of replaying the murder in their mind's eye as they prepare for and attend parole hearings. Worse still, they must repeat this process over and over each time the killer become eligible for parole. And throughout this process, they live in constant fear that the killer will be set loose on society. For these reasons, a life-*with*-parole sentence has been likened to

"sentencing the victim and the victim's family, as well. ... It's a sort of a virtual prison, because ... as long as [the killers] are in jail ... and as long as they come up for parole, we're sharing that sentence with them."[27] To create a rule prohibiting life-without-parole sentences for all teen-aged killers would thus impose real and immeasurable harm on their victims.

This rule would be particularly unfair where the life-without-parole sentence is already final.[28] The criminal justice system promised these victims that the killers would never be released. Having obtained legal finality, these victims were able to move on. While they may never fully overcome the physical, emotional, and psychological trauma of the crime itself, at least they could rest assured that the killer would no longer be a threat to them or any other innocent person. Reopening final sentences and forcing the victims to again encounter these killers

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27. *Sentencing the Victim* (IVS Video Inc. 2002), PBS, Independent Lens (March 2, 2004), *available at* http://www.hulu.com/watch/55120/pbs-indies-sentencing-the-victim. In addition to the emotional and physical toll on victims, the recurring parole process forces victims to incur substantial financial costs. Victims must regularly take time off from work to attend parole hearings and pay for transportation to and from the location of the parole proceedings.

28. Although such a holding should not apply retroactively, it is possible that lower courts might wrongly conclude otherwise. *See In re Sparks*, 657 F.3d 258 (5th Cir. 2011) (holding that *Graham* applies retroactively to cases on collateral review). The retroactivity problem could be avoided entirely if the issue were properly left to the state legislatures. *See e.g.*, Texas Penal Code § 12.31(a); *Meadoux v. State*, 325 S.W.3d 189, 194 (Tex. Crim. App. 2010) (noting that "the Legislature specified that the amendment of § 12.31(a) was not to be applied retroactively").

through the parole process would effectively transfer the life sentence from the perpetrator of the heinous crime to his innocent victim.

Moreover, invalidating final sentences of teen-aged murderers would thwart victims' participatory rights. There is a national consensus that crime victims have a right to participate in the criminal process. "As might be expected, statutes and constitutional provisions regarding specific crime victims' rights differ across jurisdictions, but there is general agreement about which victims' rights are most important." *See* Dean G. Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 32 J.L. MED. & ETHICS 73, 78 (2004). These are victims' participatory rights, which "are designed to parallel defendants' rights to participate in criminal proceedings" and thus include the rights "to be notified about key criminal justice system proceedings and hearings, to be present at such hearings and proceedings, and to be heard at appropriate points in such hearings and proceedings." *Id.*; *see, e.g.*, ALA. CODE § 15-23-79(b) ("The victim shall have the right to be notified by the Board of Pardons and Paroles and allowed to be present and heard at a hearing when parole or pardon is considered."); ARK. CODE § 16-90-1113(a)(1)(A) ("Before determining whether to release the defendant on parole, the Parole Board shall permit the victim to present a written victim impact statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding whether the defendant should be released on parole."); *id.* § 16-90-1113(a)(1)(B) ("At the victim's option, the victim may present the statement orally at the parole hearing.").

Because the life-without-parole sentence brings closure to the legal process, victims tend not to retain court records or take steps to preserve witness testimony or other important evidence. As time passes, victims may no longer have access to key evidence and information that has particular relevance to parole proceedings. Some NOVJL members, for example, have indicated that key witnesses to the murder of a family member have passed on. Others have noted that they do not have transcripts of key proceedings, such as when the sentencing judge explained the court's reasons for imposing a sentence of life without parole. And because electronic dockets are of relatively recent vintage (and do not even exist in some places), victims may be left with no means of obtaining information that might be crucial to determining whether a murderer stays in prison or is set free.

Without access to important evidence bearing on a parole determination, the promise of victims' participatory rights is an empty one. And because "parole boards cannot make sound decisions about the release of convicts from prison without information from victims," Kilpatrick, *Interpersonal Violence and Public Policy: What About the Victims?*, 32 J.L. MED. & ETHICS 73, 74 (2004), murderers who remain dangerous to the public may be set free among an unsuspecting public.

CONCLUSION

For the reasons set forth herein, the judgments of the Alabama Court of Criminal Appeals and the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

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February 21, 2012

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 17 2012
OFFICE OF THE CLERK

Nos. 10-9646 & 10-9647

IN THE

Supreme Court of the United States

EVAN MILLER

Petitioner,

v.

STATE OF ALABAMA

Respondent.

KUNTRELL JACKSON

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION

Respondent.

ON WRITS OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND THE SUPREME COURT OF ARKANSAS

BRIEF OF PROFESSOR OF LAW AND HIS STUDENTS FROM THE MORITZ COLLEGE OF LAW AT THE OHIO STATE UNIVERSITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. The Eighth Amendment requires a sentencing scheme to recognize and give some effect to the fact that juveniles are a special class of criminal offenders with a distinct level of culpability	2
II. The Eighth Amendment requires a sentencing scheme to make distinctions among different types of murder offenses in the imposition of the most severe possible punishments	7
III. The Eighth Amendment requires a sentencing scheme to avoid problematic application of extreme mandatory punishments	10
IV. The Eighth Amendment precludes a sentencing scheme that mandates extreme prison sentences for especially young juveniles like Kuntrell Jackson and Evan Miller, whose homicide offenses were not among the "worst of the worst"	14
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

CASES

Atkins v. Virginia,
536 U.S. 304 (2002) 7

Brown v. Sanders,
546 U.S. 212 (2006) 8

Eddings v. Oklahoma,
455 U.S. 104 (1982) 2, 3

Enmund v. Florida,
458 U.S. 782 (1982) 8

Furman v. Georgia,
408 U.S. 238 (1972) 8

Graham v. Florida,
130 S. Ct. 2011 (2010) ..... *passim*

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011) 3

Jackson v. State,
194 S.W.3d 757 (Ark. 2004)..... 14

Johnson v. Texas,
509 U.S. 350 (1993) 3, 4

Koon v. United States,
518 U.S. 81 (1996) 11

Cited Authorities

Page

Lockett v. Ohio,
438 U.S. 586 (1978) 7-8, 10

Loving v. United States,
517 U.S. 748 (1996)..... 8

Naovarath v. State,
779 P.2d 944 (Nev. 1989)..... 6, 13

Pennsylvania ex rel. Sullivan v. Ashe,
302 U.S. 51 (1937) 11

Penry v. Lynaugh,
492 U.S. 302 (1989) 12

People v. Dillon,
668 P.2d 697 (Cal. 1983) 13

Pepper v. United States,
131 S. Ct. 1229 (2011) 11

Phillips v. Florida,
807 So.2d 713 (Fla. Dist. Ct. App. 2002) 16

Roberts v. Louisiana,
428 U.S. 325 (1976) 10, 11

Roper v. Simmons,
543 U.S. 551 (2005) ..... *passim*

Cited Authorities

Page

State v. Martin,
773 N.W.2d 89 (Minn. 2009) 16

Sumner v. Shuman,
483 U.S. 66 (1987) 8, 10, 11

Tennessee v. Howell,
34 S.W.3d 484 (Tenn. Crim. App. 2000) 16

Thompson v. Oklahoma,
487 U.S. 815 (1988) 4, 6

Tison v. Arizona,
481 U.S. 137 (1987) 8

Trop v. Dulles,
356 U.S. 86 (1958) 7, 9, 12

Weems v. United States,
217 U.S. 349 (1910) 7

Williams v. New York,
337 U.S. 241 (1949) 11

Woodson v. North Carolina,
428 U.S. 280 (1976) 10, 11

Workman v. Kentucky,
429 S.W.2d 374 (Ky. 1968) 6

Cited Authorities

Page

CONSTITUTION AND RULES

U.S. Const. amend VIII ..... *passim*

Sup. Ct. R. 37.6 1

MISCELLANEOUS

Brief for Petitioner in *Jackson v. Hobbs*, No. 10-9647..... 14-15

Brief for Petitioner in *Miller v. Alabama*, No. 10-9646 13-14

Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 Developmental Psychobiology 263 (2010) 5

Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 American Psychologist 739 (2009)... 5

Powers of the Criminal Courts (Sentencing) Act 2000, § 90 (Eng.) 6

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are a law professor and his law students who have been teaching, studying and writing about sentencing laws, issues, and policies. The drafters of this brief recently participated in a law school class in which they examined modern Eighth Amendment jurisprudence and its implications. Amici offer this brief to highlight sentencing principles deserving of attention in the consideration of whether juvenile offenders may be sentenced to life imprisonment without the possibility of parole.

SUMMARY OF THE ARGUMENT

Interpreting the Eighth Amendment's prohibition on cruel and unusual punishments, this Court has repeatedly stressed that juveniles are a special and unique class of criminal offenders who have a distinct level of maturity, mental capacity, and vulnerability to negative influences. In addition, this Court's Eighth Amendment jurisprudence has repeatedly recognized that not all homicide offenses are constitutionally equivalent; because murders can and will differ in their severity, a constitutional scheme of punishment must sometimes differentiate between and among murder offenses. This Court's Eighth Amendment jurisprudence has also identified constitutional problems

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1. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution toward the preparation and submission of this brief. Counsel of records for both parties have consented to this brief's filing in letters on file with the Clerk's Office.

with certain aspects of some mandatory sentencing schemes. Collectively, these established jurisprudential principles connote that any statutory scheme which mandates that a juvenile offender convicted of a certain class of homicide must be sentenced to life without the possibility of parole, without any consideration of the offender's age or any other potential mitigating offense circumstances, violates the Eighth Amendment's prohibition on cruel and unusual punishments.

ARGUMENT

I. The Eighth Amendment requires a sentencing scheme to recognize and give some effect to the fact that juveniles are a special class of criminal offenders with a distinct level of culpability.

This Court's Eighth Amendment jurisprudence has expressly and repeatedly stressed that juveniles are distinct types of criminal offenders due to their limited and still-developing maturity and mental capacity and due to their particular vulnerability to negative influences. Finding an Eighth Amendment violation in the death sentence imposed on a 16-year-old murderer, this Court three decades ago in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), effectively articulated why an offender's age is critical to an assessment of just punishment:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally

> are less mature and responsible than adults. Particularly during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment expected of adults.

Id. at 115–16. *Accord Johnson v. Texas*, 509 U.S. 350, 366 (1993) (discussing the constitutional significance of an offender's age in capital sentencing because a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young[, and these] qualities often result in impetuous and ill-considered actions and decisions"); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) ("[t]ime and again, this Court has ... observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to outside pressures than adults. ... The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

In numerous Eighth Amendment cases since *Eddings*, this Court has not only reiterated these uncontested facts about human development and the "mitigating qualities of youth," *Johnson*, 509 U.S. at 366, but it also has repeatedly struck down as unconstitutional punishment schemes that fail to give adequate legal effect to the realities of youthful status. *See, e.g.*, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (finding unconstitutional life without parole sentences for all juvenile offenders who committed nonhomicide

offenses); *Roper v. Simmons*, 543 U.S. 551 (2005) (finding unconstitutional death sentences for all juvenile offenders); *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (finding unconstitutional death sentences for all offenders under 16); *cf. Johnson*, 509 U.S. at 366–70 (upholding a death sentence imposed on a 19-year-old murderer only because the sentencing jury was given instructions that provided "a meaningful basis to consider the relevant mitigating qualities of petitioner's youth").

Though this Court first based assertions about juveniles' behavior and mitigated culpability on common sense observations, modern social and cognitive science has confirmed and amplified its insights about the social and moral significance of youth. As this Court highlighted most recently in *Graham*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds," in part because "parts of the brain involved in behavior control continue to mature through late adolescence." 130 S. Ct. at 2026. The research demonstrating distinct neurological characteristics of juveniles provides a firm and enduring biological foundation for this Court's long-standing position that the developing mind of juveniles entails that younger offenders "are more capable of change than are adults, and their actions are less likely to be evidence of irretrievably depraved character than are the actions of adults." *Id.*; *see also Johnson*, 509 U.S. at 366–70 (stressing that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside"); *Roper*, 543 U.S. at 570 ("The personality traits of juveniles are more transitory, less fixed" than adults).

The very latest scientific research further confirms the Court's statements in *Graham* and prior cases about the nature of juveniles. Continuing research on adolescent psychology and brain neuroscience now provides even stronger evidence that significant brain developments occur through adolescence: recent studies suggest adolescents lack the fully developed cognitive ability to weigh the risks and rewards of their actions, and may also lack the ability to process emotional and social information leading to heightened susceptibility to negative influences.[2] Professor Laurence Steinberg, whose research was cited by this Court in *Roper*, recently addressed the emerging consensus in the scientific community by explaining that "[a]dolescents' neurobiological immaturity, relative to adults, is a fact, and within the neuroscience community, an uncontroversial one at that."[3]

This Court need not, and arguably should not, use these cases involving crimes committed by 14-year-old children to expound broadly upon what the "mitigating qualities of youth" entail whenever juveniles are subject to

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2. *See* Daniel Romer, *Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention*, 52 Developmental Psychobiology 263, 264 (2010); Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 American Psychologist 739, 742–745 (2009).

3. Steinberg, *supra* at 742–745 (discussing in detail how the brain's gray and white matter develop during adolescence and have an impact on several key cognitive processes including response inhibition, planning ahead, and weighing risks and rewards, as well as how this development period also alters connections between cortical and subcortical regions of the brain critical for the processing of emotional and social information and control processes).

adult criminal sanctions and procedures. But the modern cognitive science combines with this Court's established punishment jurisprudence to fortify a transcendent Eighth Amendment principle articulated by this Court decades ago: a juvenile's criminal offense necessarily "is not as morally reprehensible as that of an adult." *Thompson*, 487 U.S. at 835. This principle, in turn, connotes that a constitutionally sound sentencing scheme ***must*** give some legal effect to an offender's juvenile status. As the Chief Justice recently put matters in *Graham*, "under our Court's precedents, [an offender's] youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive." 130 S. Ct. at 2042 (Roberts, C.J., concurring).[4]

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4. The conclusion in *Graham* and *Roper* that proportionate punishment schemes ***must*** recognize and give some effect to the fact that juveniles are a special class of criminal offenders with a distinct level of culpability finds additional support in significant rulings of state supreme courts and in the doctrines of other nations which also trace their views of civilized punishment to the English Declaration of Rights of 1689. *See, e.g.*, *Workman v. Kentucky*, 429 S.W.2d 374, 378 (Ky. 1968) ("[w]e believe that incorrigibility is inconsistent with youth; that it is impossible to make a judgment that a fourteen-year-old youth, no matter how bad, will remain incorrigible for the rest of his life."); *Naovarath v. State*, 779 P.2d 944, 946–47 (Nev. 1989) (overturning 13-year-old's life without parole sentence for murder while explaining that children "are and should be judged by different standards from those imposed upon mature adults" and that to "adjudicate a thirteen-year-old to be forever irredeemable and subject a child of this age to hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even if the criminality amounts to murder"); *Powers of the Criminal Courts (Sentencing) Act 2000*, § 90 (Eng.) (codifying prohibition of life without parole sentences for juveniles in the United Kingdom).

Any sentencing system that entirely fails to consider an offender's youth as one factor, among others, in deciding on that offender's punishment is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

II. The Eighth Amendment requires a sentencing scheme to make distinctions among different types of murder offenses in the imposition of the most severe possible punishments.

For more than a century, this Court has stressed that the Eighth Amendment's limit on excessive criminal sanctions flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to offense." *Weems v. United States*, 217 U.S. 349, 367 (1910). *Accord Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Roper*, 543 U.S. at 559; *see also Trop v. Dulles*, 356 U.S. 86, 100–02 (1958) (plurality opinion) (stressing that though "the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards" and that a punishment's constitutionality "depend[s] upon the enormity of the crime").

Consistent with precepts of justice concerning proportional punishment, this Court's resolution of Eighth Amendment challenges to capital punishment schemes have repeatedly stressed that the nature of the defendant's involvement in the offense and the defendant's culpable mental state are essential in any determination of whether and when our society's most severe punishments may be constitutionally imposed. *See, e.g.*, *Lockett v. Ohio*, 438

U.S. 586, 608 (1978) (finding Ohio's capital sentencing procedures unconstitutional because the "consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision"); *Enmund v. Florida*, 458 U.S. 782, 788–96 (1982) (explaining that "punishment must be tailored to [a defendant's] personal responsibility and moral guilt" and finding "impermissible under the Eighth Amendment" Florida's capital sentencing scheme because it failed to give effect to the critical fact that the defendant "did not kill or intend to kill"); *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (upholding the constitutionality of the death penalty for murderers exhibiting "reckless indifference to human life"). *Accord Sumner v. Shuman*, 483 U.S. 66, 79–80 (1987) ("[t]his Court has recognized time and again that the level of criminal responsibility of a person convicted of murder may vary according to the extent of that individual's participation in the crime.")

Importantly, this Court's Eighth Amendment jurisprudence has not only declared that states categorically may ***never*** punish certain murder offenses with the death penalty, *see Enmund*, but it has also required states to develop statutory sentencing schemes that "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Loving v. United States*, 517 U.S. 748, 755 (1996); *see also Brown v. Sanders*, 546 U.S. 212, 216 (2006) ("[s]ince *Furman v. Georgia*, 408 U.S. 238 (1972), we have required States to limit the class of murderers to which the death penalty may be applied.").

This Court's Eighth Amendment rulings that (1) completely prohibit the punishment of death for some murder offenses and (2) expressly demand statutory schemes to narrow further which other murderers may be subject to this punishment are not merely unique and peculiar constitutional commands with significance only in capital cases. Rather, as an expression of the Eighth Amendment's fundamental limit on excessive sanctions through the Cruel and Unusual Punishments Clause—the text of which, of course, makes no distinction based on types of "punishment"—this jurisprudence stands for and safeguards more broadly the principle that a constitutionally sound sentencing scheme must make legal distinctions among different classes of homicide in the imposition of our society's most severe punishments. It would be wholly inconsistent with the precept of justice that punishment "be graduated and proportioned to offense," as well as jurisprudentially obtuse, for the Eighth Amendment to restrict significantly which murderers states can merely make eligible for the death penalty, but then permit states without any constitutional parameters to subject every other offender found legally responsible for another's death to suffer every other extreme form of punishment without any consideration of potentially mitigating offense factors.

More than a half-century ago, this Court in *Trop v. Dulles* rightly stressed that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination." 356 U.S. at 100–01. This Court's subsequent Eighth Amendment jurisprudence, in turn, gives effect to this admonition by holding that *both* the nature of a defendant's involvement in an offense and his culpable

mental state are essential to a sound determination of whether and when our society's most severe punishments may be constitutionally imposed. Any sentencing system that imposes extreme and unbending punishments while refusing to consider or give any legal effect to the nature of a defendant's involvement in an offense and his culpable mental state is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

III. The Eighth Amendment requires a sentencing scheme to avoid problematic application of extreme mandatory punishments.

Providing another significant expression of the Constitution's demand for reliable and proportionate application of society's most severe punishments, this Court has long declared that the Eighth Amendment prohibits states from making death a mandatory punishment for even the most culpable forms of aggravated murder. *See Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976). Not only is it constitutionally essential that a sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604, but the Eighth Amendment categorically precludes states, even when responding to murders committed by those already serving life sentences for prior murders, from adopting any laws that fail to consider offenders "as uniquely individual human beings" instead of as "a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Sumner*, 483 U.S. at 74–75 (quoting *Woodson*, 428 U.S. at 304).

Critically, this Court began establishing the "constitutional mandate of individualized determinations in capital-sentencing proceedings," *Sumner*, 483 U.S. at 75, based expressly our nation's long-standing "prevailing practice of individualizing sentencing determinations," *Woodson*, 428 U.S. at 304, which reflects more broadly "society's rejection of the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'" *Roberts*, 428 U.S. at 333 (quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)); *see also Pepper v. United States*, 131 S. Ct. 1229, 1239–40 (2011) ("[I]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.") (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

This Court has generally described our nation's tradition of individualized sentencing determinations as "simply enlightened policy rather than a constitutional imperative" outside the death penalty setting. *Woodson*, 428 U.S. at 304. But the imposition of the extreme sentence of life without parole is, functionally, a life-and-death punishment determination for a defendant; consequently, the "fundamental respect for humanity underlying the Eighth Amendment," *id.*, should likewise demand a process that enables a sentencer to "be able to consider and give effect to [mitigating] evidence in imposing sentence"

so to be confident that the imposition of life without any possibility of parole reflects "a reasoned moral response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Given the Eighth Amendment's fundamental concern with excessive sanctions through the Cruel and Unusual Punishments Clause—the text of which, of course, makes no distinction based on types of "punishment"—a constitutionally sound sentencing scheme must allow the sentencing authority (and not merely a partisan prosecutor through the unregulated and hidden exercise of charging and bargaining discretion) to have some formal and functional mechanism for distinguishing which offenders may need and deserve to be forever caged and condemned to die in prison and which may not. Again, it would be inconsistent with the precept of justice that punishment "be graduated and proportioned to offense," as well as jurisprudentially obtuse, for the Eighth Amendment to require states to give all repeat intentional murderers already serving life terms a constitutional right to always argue for a reduced sentence, but then permit states without any constitutional parameters to mandate that every other homicide offender always be condemned to die in prison without giving any consideration or legal effect to potentially mitigating offense or offender factors.

This Court need not, and arguably should not, use these cases involving crimes committed by 14-year-old children to expound broadly on whether and when mandatory application of life without the possibility of parole sentences is now contrary to the "the evolving standards of decency that mark the progress of a maturing society," *Trop*, 356 U.S. at 100–01, and thus fails to reflect properly the "history, tradition, and precedent" of the

Eighth Amendment "with due regard for its purpose and function in the constitutional design." *Roper*, 543 U.S. at 555–56. But in light of this Court's established jurisprudence that a defendant's youth and immaturity are paradigmatic examples of constitutionally essential mitigating evidence, these cases do present an important opportunity to declare that any statutory scheme which ***mandates that a juvenile offender*** convicted of a certain class of homicide be sentenced to life without the possibility of parole, without any consideration of the offender's age or any other potential mitigating offense circumstances, violates the Eighth Amendment's prohibition on cruel and unusual punishments.[5] *See generally* Brief for Petitioner in *Miller v. Alabama*, No.

5. Tellingly, there is a history of state supreme courts overturning life without parole sentences for juveniles who commit homicide based on their recognition that the permanence of such a sentence fails to allow any discretionary assessment of whether a young offender is indisputably irredeemable. The California Supreme Court, for example, overturned a youth's life without parole sentence after taking into consideration his age and finding he was an "unusually immature youth" who had never been in trouble with the law before, and was not a "hardened criminal" who poses a "grave threat to society." *People v. Dillon*, 668 P.2d 697, 726–27 (Cal. 1983). The Nevada Supreme Court, when overturning a life without parole sentence for a boy who was convicted of murdering a disabled man who had molested him, similarly stressed the that "the child before us [could be] the beginning of an irremediable dangerous adult human being, but we certainly cannot know that fact with any degree of certainty *now*." *Naovarath*, 779 P.2d at 947 (emphasis in original). These rulings reflect the sound view that an individualized judgment of a juvenile offender's character and his offense's circumstances is essential for juvenile sentencing to avoid the risk of imposing cruel and unusual punishments through adult mandatory sentencing structures.

10-9646, at 25–29 (highlighting why mandatory life-without-parole sentencing of juveniles is different in kind from mandatory sentencing of adult offenders). Again, because "youth is one factor, among others, that should be considered in deciding whether his punishment was unconstitutionally excessive," *Graham*, 130 S. Ct. at 2042 (Roberts, C.J., concurring), any sentencing system that mandates a life without parole sentence without allowing in any way the sentencing authority to consider mitigating factors is constitutionally suspect and will sometimes impose constitutionally excessive punishments. The Eighth Amendment's prohibition on extreme punishments precludes such a sentencing system.

IV. The Eighth Amendment precludes a sentencing scheme that mandates extreme prison sentences for especially young juveniles like Kuntrell Jackson and Evan Miller, whose homicide offenses were not among the "worst of the worst."

The Eighth Amendment principles stressed above are especially important in these cases because Kuntrell Jackson and Evan Miller, both only fourteen years old at the time of their homicide offenses, plainly were not guilty of an extreme type of intentional murder for which society and its laws typically ascribe the most extreme punishments. Kuntrell Jackson, for example, was just a peripheral participant in a video store robbery in Arkansas; he merely entered the store as two older boys were already pointing a gun at the store clerk, and he was not directly involved in, nor never intended, the shooting of the clerk. *See Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004). As Kuntrell Jackson's brief highlights, *see* Brief for Petitioner in *Jackson v. Hobbs*, No, 10-9647, at

63–64, arguably his culpability is even less than Terrance Graham's, the repeat offender who at age 17 committed his second armed robbery and yet still could not be constitutionally sentenced to the life without parole term that Kuntrell Jackson is now serving. Notably, and again in contrast to Terrance Graham's situation, no judge ever decided that a life without parole sentence was needed or justifiable for Kuntrell Jackson; he was sentenced to this extreme prison term only by virtue of a statute which mandated this sentence for anyone who participated in a capital felony-murder (and because of the decision by state prosecutors to try him in adult court). The sentencing judge in this case did not—indeed, under the law as it applied here, was not permitted to—consider Kuntrell Jackson's young age, his limited involvement in the offense, his diminished culpability based on his mental state, or any other mitigating factors.

Kuntrell Jackson's case especially illustrates the necessity for special constitutional reservations regarding any sentencing schemes that involve what might be called "categorical conclusions"—such as the imposition of mandatory life without parole sentences for all offenders who commit a certain crime. *Cf. Graham*, 130 S. Ct. at 2041 (Roberts, C.J., concurring). As members of this Court have stressed, painting with a broad, one-size-fits-all constitutional brush risks failing to respect the reality that "[s]ome crimes are so heinous, and some juvenile offenders so highly culpable" that extreme prison sentences may sometimes be justifiable. *See id.* at 2042. This reality, in turn, highlights the constitutional importance of a sentencing scheme that recognizes that "exceptional case[s]" occur and that a state's mandatory "categorical rule[s] applicable to far different cases" at

sentencing is constitutionally suspect and will sometimes result in constitutionally excessive punishments. *Id.*

For these reasons, Kuntrell Jackson and Evan Miller's appeals do not require this Court to reach a firm constitutional conclusion as to whether an extreme prison sentence might sometimes be justifiable when, for example, a teenager lines up a family of four in front of a ditch and brutally guns them down, one by one—assassinating three in cold-blood and seriously injuring the fourth as they beg to be spared. *Cf. Tennessee v. Howell*, 34 S.W.3d 484, 487–88 (Tenn. Crim. App. 2000) (noting, inter alia, that the teenage defendant bragged about his killing spree while in custody); *see also State v. Martin*, 773 N.W.2d 89, 89 (Minn. 2009) (describing a particularly cold-blooded intentional murder by a teenage gang member); *Phillips v. Florida*, 807 So. 2d 713, 715 (Fla. Dist. Ct. App. 2002) (describing an exceptionally brutal and violent intentional murder of a young child by a teenager). Though this Court certainly could again take a "categorical approach" to examine in these cases whether and when certain juvenile offenders may be subject to certain extreme punishments, *cf. Graham*, 130 S. Ct. at 2021-23, this Court should not fail to acknowledge and hold at the very least that, "given all the circumstances," the extreme punishments of life without the possibility of parole mandatorily imposed on Kuntrell Jackson and Evan Miller are unconstitutionally excessive. *See id.* at 2036 (Roberts, C.J., concurring) (explaining that defendant's "juvenile status ... together with the nature of his criminal conduct and the extraordinarily severe punishment imposed" sufficiently justifies conclusion that noncapital sentence violated the Eighth Amendment based on the "particular defendant and particular crime at issue").

CONCLUSION

For these reasons, this Court should declare the life without parole sentences of Kuntrell Jackson and Evan Miller to be unconstitutional.

Respectfully submitted,

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